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No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

—o—

ANN P. FIELDS, GERALD FIELDS and
LIFE FOR GOD'S STRAY ANIMALS, INC.,
Petitioners,

v.

GAYLE ALLEN, *et al.*,
Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

—o—

ABRAHAM A. SHARONY
4721 Chamblee-Dunwoody Road
Suite 302
Atlanta, Georgia 30338
(404) 395-6576

KATHLEEN KESSLER
CARR & KESSLER
3384 Peachtree Road, N.E.
Suite 330
Atlanta, Georgia 30326
(404) 233-5008

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

56 pp

QUESTION PRESENTED

Whether the decision by the Supreme Court of Georgia, affirming the judgment of the trial court which disallowed Petitioners from presenting evidence, or cross-examining Respondents' witnesses, at trial, as punishment for Petitioners' civil contempt in another case, constituted a deprivation of Petitioners' rights under the Constitution of the United States, in conflict with the decision of the Supreme Court of the United States in *Hovey v. Elliott*, 167 U.S. 409 (1897), where the Supreme Court of the United States held that the striking of a party's answer and entry of default (as was done by the trial court in the present case) as *punishment* for a civil contempt, deprived the party of due process of law and the constitutional right to the party's day in court, under the Constitution of the United States; and in conflict with the Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972), wherein the Court ruled that property owners were entitled to a hearing before their property was seized, even if they had no valid defenses.

In the case before the Court, neither Petitioner Life for God's Stray Animals, Inc., the owner of the property in question, nor Petitioners Ann and Jerry Fields, were allowed to participate in the trial which ultimately resulted in a "no-kill" animal shelter being declared a nuisance, and in Petitioners being directed to "close down" the shelter.

PARTIES

The Petitioners herein are Ann P. Fields, Gerald Fields, operators of a no-kill animal shelter Life for God's Stray Animals, Inc., a charitable, non-profit corporation, and owner of the shelter property located in Rockdale County, Georgia.

The Respondents herein are Gayle Allen, Bobby Allen, George William Stephens, Robin Bennett, John Bennett, Steve Wittenmyre, Sandy Wittenmyre, Joe Wilkins, E. F. Forrester, Ruby Forrester, Charles B. Rotenburg, Bob Trivitt, Debbie Trivitt, Frank C. Snipes, Eulalie Leverette, David Little, Brenda Little, Keith Thomas, Kenny Thomas, Josephine Watson, T. R. Chastain, Betty J. Chastain, W. S. Connor, Marvin Dow, Linda Dow, Jessie Fortner, Della Fortner, Lucille Lamar, Tommy Wilkerson, Judy Wilkerson, John Walton Henderson, Sr., Harold Machen, Alton C. Henderson, Individually and as The Walton-Newton-Rockdale County Homeowners Association, and Rockdale County, Georgia.

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No. .....

In The
Supreme Court of the United States
October Term, 1987

ANN P. FIELDS, GERALD FIELDS and
LIFE FOR GOD'S STRAY ANIMALS, INC.,
Petitioners,

v.

GAYLE ALLEN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioners herein respectfully pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Georgia entered on September 9, 1987 and rehearing denied on September 24, 1987.

OPINIONS BELOW

Appendix, Part VI, Order by trial court of March 11, 1987.

Appendix, Part VII, decision by Supreme Court of Georgia affirming the trial court Judgment without opinion on September 9, 1987.

Appendix, Part VIII, decision by Supreme Court of Georgia dated September 24, 1987, denying Petitioners' Motion for Rehearing without opinion.

JURISDICTION

The Judgment of the Supreme Court of Georgia was entered on September 9, 1987. (App. 26). Petitioners/Appellants' Motion for Rehearing was denied on September, 24, 1987. (App. 27). This Petition for Writ of Certiorari is filed within ninety (90) days of the Order of the Supreme Court of Georgia denying rehearing. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE AND PERTINENT FACTS

This case originates in the Superior Court of Rockdale County, Georgia (hereinafter referred to as the "trial court") where Respondents filed a Civil Complaint against Petitioners, claiming that the operation of Life for God's Stray Animals, Inc.'s (LFGSA) "no-kill" animal shelter constituted a nuisance. (App. 21).

Under the guise of a sanction for Petitioners Ann P. Fields and Gerald Fields not appearing to give their oral

depositions, (see copies of Notices of Deposition, Appendix Parts XIII and XIV attached hereto) the trial court struck all Petitioners' defensive pleadings including the Answer of Petitioner LFGSA, although the oral deposition notices were not even addressed to LFGSA, without a prior evidentiary hearing, and proceeded with a bench trial wherein only Respondents presented evidence of their nuisance claims. (App. 11). Petitioners, however, were not permitted by the trial court to participate in the bench trial, either by cross-examination of Respondents' witnesses, or through presentation of evidence by Petitioners. (App. 11 to 18). In truth and in fact, the trial court struck Petitioners' pleadings and held Petitioners to be in default, as mere punishment for Petitioners' civil contempt, before the same trial court, in a different case which related to the operation by Petitioners of an animal shelter at a different location. (*See* Appendix Part XII attached hereto). Petitioners Ann P. Fields and Gerald Fields had left the State of Georgia when confronted with an *indefinite* jail sentence by reason of their civil contempt in the other case; the indefinite jail sentence had been entered by reason of Petitioners' failure to move animals from the other shelter location in accordance with the schedule of the trial court. The Georgia Supreme Court dismissed the appeal of Ann P. Fields and Gerald Fields in the other case, from the said indefinite jail sentence, by reason of Petitioners' flight from the State. (*See* copy of Georgia Supreme Court decision in the aforesaid case, attached hereto marked Appendix Part XII). The punishment of Petitioners in this case by the trial court, by reason of the civil contempt in the other case, was evidenced by a number of statements made by the trial court, and other pertinent events and circumstances including the following:

(a) On February 16, 1987 the trial court entered an Order denying Petitioners' Motion to Change Venue and Demand for Jury Trial, and granted Respondents' Motion to Strike All of Petitioners' Pleadings and for Entry of Default Judgment, although the oral deposition notices were not even addressed to Petitioner LFGSA who was the owner of the property in question. (App. 2). Included in the February 16 Order were the following statements by the trial court:

> "The defendants' . . . are fugitives on a civil contempt in another case . . ." (App. 2).

(b) On February 26, 1987, without holding a prior evidentiary hearing as to the issue of wilfulness, as required by the applicable Georgia law, the trial court entered an Order striking the pleadings of all Petitioners, including LFGSA (App. 11), although the Respondents' Notices of Deposition were not even addressed to LFGSA. (App. 32 and 34).

(c) In anticipation of the bench trial, Petitioners filed with the trial court, on March 6, 1987, a Renewed and Amended Motion to Recuse and to Change Venue, Motion to Set Aside Default and for Continuance on Constitutional Grounds (App. 4) and Motion to Allow Defendants to Cross-Examine and Present Evidence. (App. 7), (hereinafter referred to as the "pretrial motions"). At the commencement of the bench trial on March 9, 1987 the trial court announced that it would hear evidence from the Respondents to "substantiate their position" (App. 11), but would not

hear any testimony from Petitioners, nor allow Petitioners to participate in the trial by examination of witnesses or taking any active status. (App. 11). The trial court announced, also, that the pretrial motions filed by Petitioners would be denied. (App. 12).

(d) In connection with Petitioners' Motion to Set Aside Default, wherein Petitioners Ann and Gerald Fields offered to give their depositions through interrogatories, by long distance telephone, or other alternative means, (App. 4 and 13), the trial court stated the following:

> "This court is not going to take (allow) any alternative measures (of discovery) to protect the position of the *Fieldses who are fugitives* of the court and for this court to do this to protect their interests is beyond the stretch of imagination."[1] (App. 14). (emphasis added).

(e) Petitioners' attorney argued, unsuccessfully, at the March 9, 1987 bench trial, that Petitioners' status as to contempt charges in another case should not prejudice their right to participate in their own trial in the present case. (App. 15).

(f) With respect to the Motion to Allow Petitioners to Cross-Examine and Present Evidence, which contained a written offer of proof as to various items of pertinent evidence (App. 7), the trial court did not permit Petitioners to make such an offer of proof at trial, as to what evidence Petitioners could bring out by cross-examination or by affirmative presentation

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[1]The trial court ignored the separate interest of LFGSA, the owner of the property, although Respondents' Notices to Take Depositions were not even addressed to LFGSA.

of evidence; Petitioners' request to make an offer of proof was made and denied by the trial court.[2] (App. 15).

(g) On March 9, 1987, in an order regarding a discovery motion, the trial court reiterated the following statement regarding Ann and Gerald Fields' so-called "fugitive" status:

> "The defendants maintain their fugitive status." (App. 19).

(h) On March 11, 1987 the trial court entered an Order including the following findings and conclusions, again, referring to the so-called "fugitive" status of Petitioners Ann P. Fields and Gerald Fields:

> "The court further finds that the defendants Ann P. Fields and Gerald Fields are fugitives from this state . . ." (App. 22).

Following the bench trial and presentation of evidence only by Respondents, the trial court entered an Order holding that the maintenance of Petitioners' animal shelter constituted a nuisance, and Petitioners were ordered to close and cease operating the animal shelter, and to remove all animals from the property within thirty (30) days. (App. 25). Upon appeal by Petitioners, the Supreme Court of Georgia affirmed the Judgment of the trial court without opinion. (App. 26). Petitioners' motion for rehearing in

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[2]Prior to commencement of the March 9, 1987 bench trial, the trial court permitted Petitioners' attorney to object to the trial proceeding without participation by Petitioners, upon legal and constitutional grounds, including due process of law. (App. 15).

the Supreme Court of Georgia was denied on September 24, 1987. (App. 27).

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SUMMARY OF ARGUMENT

Under the guise of a discovery sanction, the trial court barred Petitioners (including the charitable corporation which owns the property) from participating in a trial in Rockdale County, Georgia, wherein the trial court declared a "no-kill" animal shelter located next to a garbage dump a "nuisance" and stripped Petitioners of their property rights without due process of law, as *punishment* for a civil contempt of Petitioners in another case. The Supreme Court of Georgia affirmed the decision of the trial court without a written opinion.

The actions of the Georgia courts were contrary to the basic due process standards set out by this Court ninety (90) years ago in *Hovey v. Elliott,* 167 U.S. 409 (1897); and recently reiterated in cases such as *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972).

The Georgia trial court even denied a defense and participation in the trial to the corporate Petitioner Life for God's Stray Animals, Inc., who owns the property at issue and who was not properly subject to any discovery sanction.

Georgia courts have routinely denied these Petitioners a defense on the issue of nuisance for their shelter. Petitioners have no other recourse to appeal a fundamental due process right of taking property without a hearing or defense allowed.

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE TRIAL COURT AND THE SUPREME COURT OF GEORGIA HAVE VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS AND THE RIGHT TO THEIR "DAY IN COURT" UNDER THE CONSTITUTION OF THE UNITED STATES

A. The Punishment Of Petitioners By Reason Of Their Civil Contempt In Another Case Violated Petitioners' Constitutional Rights.

The Supreme Court of the United States has held that the striking of a party's answer and entry of default, as punishment for a civil contempt, deprived the party of due process and the constitutional right to the party's "day in court." *Hovey v. Elliott,* 167 U.S. 409 (1897). The Supreme Court has extended the *Hovey v. Elliott* rule to apply to the dismissal of an appeal:

> "The appeal here was but a continuation of petitioner's defense which began in the trial court. But petitioner was denied any opportunity to defend itself in the Appellate Court because it had disobeyed a court order. By whatever other name it may be called, the dismissal was punishment . . . (citing *Hovey v. Elliott, supra*) . . . the purpose was punishment for an offense having no relation at all to the merits of the plaintiff's claim or to the petitioner's defense. *From the beginning, due process and equal protection have meant that every defendant must be permitted to defend himself in any court where his antagonist can appear and prosecute. This right of defense belongs to all-good or bad, one who has violated laws the same as one who has not . . .*" *National Union of Marine Cooks and*

Stewards v. Arnold, 348 U.S. 37, 46-47 (Justices Black and Douglas dissenting opinion). (Emphasis added).[3]

The applicable Georgia law conferred similar constitutional rights upon Petitioners by providing that where a party is in contempt of court in one case, this does not preclude the participation by that party in legal proceedings in another case, or in other proceedings in the same case. *Coker v. Norman,* 162 Ga. 351, 133 S.E. 740 (1926) (where a party was in contempt for interference with property in a receivership proceeding, same party was not precluded from filing pleadings and participating in the case); *Cason v. Cason,* 15 Ga. 405 (1854) (where a husband was in contempt for failure to pay temporary alimony, court was not authorized to deny the husband right to participate at trial, deemed "another proceeding").

Petitioners show that the above-referenced repeated statements and comments made by the trial court regarding the "fugitive" status of Ann and Gerald Fields and their "civil contempt in another case," indicate clearly that the Fields' contempt status in the other case was the reason for the trial court striking the pleadings of *all* Petitioners in the present case, disallowing alternative means of discovery suggested by Ann and Gerald Fields, and finally, not permitting Petitioners to cross-examine witnesses or to present evidence on their behalf at the trial. (App. 2, 14, and 22). The sentiment of the trial court, in this regard, was best revealed in the statement made by the trial court during the March 9, 1987 hearing:

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[3]Cf. *Hammond Parking Co. v. Arkansas,* 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530, where the pleadings of a party were struck not as a "punishment" for a separate contempt.

> "This court is not going to make (allow) any alternative measures (of discovery) to protect the position of the Fieldses who are fugitives of the court and for this court to do this to protect their interests is beyond the stretch of imagination." (App. 14).

The punishment of Petitioners, by disallowing their participation in their own trial, in the present case, by reason of a civil contempt in another case, violated their constitutional rights to due process of law (U.S. Const. Amend. V and XIV; Ga. Const. Art. 1, § 1, ¶ 1) (App. 28), as well as Petitioners' rights to equal, impartial and complete protection to their person and property (U.S. Const. Amend. XIV; Ga. Const. Art. 1, § 1, ¶ 2) (App. 28).

This Court recognized in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), the fundamental due process right to a hearing before an owner can be deprived of property, even if the owner had no valid defenses.

In *Fuentes*, and in this case, the state law provided a hearing procedure which was ignored. (See Georgia law described in section B, *infra*).

In the case before the Court, Petitioner LFGSA was not allowed a hearing before being deprived of its property rights in the shelter property through the: "close-down" Order of the trial court. The due process deprivation to the shelter, Life for God's Stray Animals, Inc., was a particularly gross miscarriage of justice as LFGSA never a party to the deposition notices of Respondents. (App. 32 and 34).

All of the contempt proceedings involved other homeowners and another property site for the shelter. Yet, on

the basis of this other action involving other parties, the trial court ruled that none of the Petitioners would be allowed to defend themselves while the court made a determination of nuisance, based upon the one-sided testimony of Respondents.

Such a breach of fundamental legal standards demonstrates the strong commitment of Respondents and others to run Petitioners' shelter out of Rockdale county—even at a site next to a garbage dump—without regard of the principles of due process.

B. Disallowing Petitioners' Day In Court Violated Their Rights Under Georgia Law.

In addition to the normal "due process" provision (App. 28), the Georgia Constitution provides for the "right of access to the courts," as follows:

> "No person shall be deprived of the right to prosecute or defend either in person or by an attorney that person's own cause in any of the courts of this state." (Ga. Const. Art. 1, § 1, ¶ 12). (App. 28).

The foregoing right, described by the courts as the "right of access to the courts," has been interpreted by the Georgia Courts to require that every party, in a civil case, have the opportunity to be heard and to present his/her claim or defense, namely to have his/her "day in court."

In the recent case of *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 302 S.E.2d 701 (1983), the Georgia Court of Appeals held that the Georgia Constitution guaranteed, to all persons, due process and

> ". . . unfettered access to the courts of this state . . . these fundamental constitutional rights require that

> every party to a lawsuit be afforded the opportunity to be heard and to present his claim or defense, *i.e.* to have his day in court . . . these rights also require that every party have the opportunity to conduct a thorough and sifting cross-examination of all witnesses against him especially where the witness is the opposite party to the cause on trial and is testifying for the purpose of making out his case." *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 302 S.E.2d 701 (1983).

In this connection, the applicable statute in Georgia, namely, *O.C.G.A.* § 24-9-64, relating to the right of cross-examination in a civil case provides as follows:

> "The right of a thorough and shifting cross-examination shall belong to every party as to the witnesses called against him." *O.C.G.A.* § 24-9-64.

Petitioners show that under the applicable state law, the trial court was required to hold an *evidentiary* hearing as to the issue of wilfulness, and to consider alternative measures of discovery and more reasonable sanctions, before imposing the ultimate harsh sanction of striking Petitioners' pleadings and entering a default. *E.g., Smith v. Mullinax,* 122 Ga. App. 833, 178 S.E.2d 909, 911 (1970) (trial court abused its discretion in entering default as discovery sanction without considering "less harsh" measures); *Cook v. Lassiter,* 159 Ga. App. 24, 282 S.E.2d 680 (1981) (trial judge's order striking defendant's pleadings and entering a default against defendant was set aside in view of lack of sufficient evidence of wilfulness on the part of defendant); *Harwood v. Great American Mortgage,* 164 Ga. App. 703, 298 S.E.2d 263 (1982) (evidentiary hearing must be held as to issue of wilfulness); *Serwitz v. GECC,* 174 Ga. App. 747, 331 S.E.2d 95 (1985) (trial court order

striking defendant's pleadings and entering a default was reversed without a proper hearing allowing defendant an opportunity to explain his failure or inability to comply). Petitioners show that there was no "evidentiary" hearing as to "wilfulness" in this case, and the trial court expressly refused to consider the possibility of alternative means of discovery which might result in "protecting the interests" of Petitioners. (App. 14).

Petitioners submit that by diregarding established state law, including, in particular, the aforesaid right of "access to the courts," the trial court and the Supreme Court of Georgia violated Petitioners' rights to due process and equal protection of the laws under the Constitution of the United States. *See Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972).

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CONCLUSION

Petitioners respectfully pray that this Honorable Court reverse the judgments of the trial court and the Supreme Court of Georgia, as contrary to the Supreme Court decision in *Hovey v. Elliott,* 167 U.S. 409 (1897), *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972), and other applicable court decisions relating to Petitioners' constitutional right to their "day in court," and the right of Petitioner LPGSA not to be deprived of its property without due process of law.

This 18th day of December, 1987.

Respectfully submitted,

ABRAHAM A. SHARONY, P.C.

BY: Abraham A. Sharony
State Bar of Ga. #637950

4721 Chamblee-Dunwoody Road
Suite 302
Atlanta, Georgia 30338
(404) 395-6576

CARR & KESSLER

BY: Kathleen Kessler
State Bar of Ga. # 416575
ATTORNEY FOR
PETITIONERS

3384 Peachtree Road, N.E.
Suite 330
Atlanta, Georgia 30326
(404) 233-5008

APPENDIX, PART I

IN THE SUPERIOR COURT OF ROCKDALE COUNTY

STATE OF GEORGIA

GAYLE ALLEN, BOBBY ALLEN, GEORGE WILLIAM STEPHENS, ROBIN BENNETT, JOHN BENNETT, STEVE WITTENMYER, SANDY WITTENMYRE, JOE WILKINS, E. F. FORRESTER, RUBY FORRESTER, CHARLES B. ROTENBERG, BOB TRIVITT, DEBBIE TRIVITT, FRANK C. SNIPES, EULALIE LEVERETTE, DAVID LITTLE, BRENDA LITTLE, KEITH THOMAS, KENNY THOMAS, JOSEPHINE WATSON, T. R. CHASTAIN, BETTY J. CHASTAIN, W. S. CONNER, MARVIN DOW, LINDA DOW, JESSIE FORTNER, DELLA FORTNER, LUCILLE LAMAR, TOMMY WILKERSON, JUDY WILKERSON, JOHN WALTON HENDERSON, SR., HAROLD MACHEN, ALTON C. HENDERSON, INDIVIDUALLY and as THE WALTON-NEWTON-ROCKDALE COUNTY HOMEOWNERS ASSOCIATION, Plaintiffs, v. ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STRAY ANIMALS, INC., ROCKDALE COUNTY, GEORGIA, Defendants.	CIVIL ACTION FILE NO. 86-CV-1934 (Filed February 16, 1987)

ORDER

The Plaintiffs in the above styled matter having filed a Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and For Attorneys' Fees, and the Defendants having * * * and entering default judgment. All that is required is a motion, notice and hearing, such as has occurred in the instant case. See *Cook v. Lassiter*, 159 Ga. App. 24 (1981); *Kruger v. Kruger*, 146 Ga. App. 461 (1978); *Interstate Fire Ins. Co. v. Mayer*, 147 Ga. App. 751 (1978).

The Defendants wilfully failed to attend their own deposition. While times and places of deposition are often changed on request, here there is no good faith effort to change the time. Instead, there is an attempt to delay, without any effort by Defendants to schedule the deposition anew on a date certain. The failure to attend the deposition was a wilfull, conscious, intentional failure to appear by the Defendants, who are fugitives on a civil contempt in another case. The Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees is therefore granted in part as set forth below.

IT IS ORDERED that:

1. Counsel for Defendants', Abe Sharony, withdrawal of Defendants' Motion to Dismiss Gerald Fields be reflected on the record;

2. The Defendants' Motion to Change Venue and Demand for Jury Trial is denied; and

3. The Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for

Attorneys' Fees is granted in part as follows. Upon the failure of Anne P. Fields or Gerald Fields, in their individual and corporate capacities,

* * *

APPENDIX, PART II

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO.
	)	86-CV-1934
ANN P. FIELDS, et al.,	)	(Filed
	)	March 6, 1987)
Defendants.	)	

DEFENDANTS' MOTION TO SET ASIDE DEFAULT AND FOR CONTINUANCE ON CONSTITUTIONAL GROUNDS

NOW COME ANN P. FIELDS, GERALD FIELDS, and LIFE FOR GOD'S STRAY ANIMALS, INC. (hereinafter referred to as Defendants) and hereby move this honorable Court to set aside the Order entered on February 16, 1987, and any subsequent Orders whereby the Court struck the defensive pleadings of these Defendants and held these Defendants to be in default, as a discovery sanction pursuant to Plaintiffs' Motion, on the following grounds:

1.

Defendants Gerald Fields and Ann P. Fields have not been shown to be in "willful" default, as required by law; no proper evidence of willfulness has been presented by Plaintiffs as a basis for the Motion and Order to strike the defensive pleadings of Defendants.

2.

In lieu of Defendants oral depositions, the Court has discretion to direct the discovery of information required by Plaintiffs to be made by alternative means of discovery, such as answers to interrrogatories, depositions upon written questions, and other available means of discovery.

3.

Defendants stand ready and willing to respond to such alternative means of discovery, as was previously suggested by Defendants on December 19, 1986 and January 6, 1987 (*See* Exhibit "A" to Court Order dated February 16, 1987).

4.

If the Court granted a reasonable continuance of the trial now scheduled to take place on March 9, 1987, for a period of thirty (30) days or less, Defendants could respond to any and all reasonable alternative discovery request.

5.

Plaintiffs' allegations of nuisance, set forth in their Complaint, if true, should rest, primarily, upon evidence independent of Defendants; the oral depositions of Defendants are insubstantial and unessential to the issues in the present case. Defendants are willing to stipulate factual issues such as ownership of the land in question and related issues (*See* Exhibit "A" attached to Court Order dated February 16, 1987).

6.

The purpose of all litigation is to seek the truth. Allowing Plaintiffs to prevail in this case by "default" would be a gross miscarriage of justice and would deprive Defendants of their rights to due process of law pursuant to the Georgia and United States Constitutions, and would, further, deprive Defendants of their rights to equal, impartial, and complete protection to their person and property pursuant to the Georgia and United States Constitutions.

7.

This Motion is based, further, upon Memorandum in Support hereof, filed on this date.

This 6th day of March, 1987.

4721 Chamblee Dunwoody Rd.
Suite 302
Atlanta, Georgia 30338
(404) 395-6576

Respectfully submitted,

ABRAHAM A. SHARONY, P.C.

BY: /s/ _____
Attorney for Defendants

(Certificate of Service omitted in printing)

APPENDIX, PART III

IN THE SUPERIOR COURT OF ROCKDALE COUNTY

STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO.
	)	86-CV-1934
ANN P. FIELDS, et al.,	)	(Filed
	)	March 6, 1987)
Defendants.	)	

MOTION TO ALLOW DEFENDANTS TO CROSS-EXAMINE AND PRESENT EVIDENCE

NOW COME ANN P. FIELDS, GERALD FIELDS, and LIFE FOR GOD'S STRAY ANIMALS, INC. (hereinafter referred to as Defendants), and respectfully move the Court to allow them to cross-examine Plaintiffs' witnesses, and to present evidence in their own defense at the bench trial now scheduled to take place on March 9, 1987, as follows:

1.

Defendants are not in "willful" default, and the Court Order striking Defendants' pleadings should be set aside and reconsidered by this honorable Court.

2.

Even if Defendants were deemed to be in default, Plaintiffs' claims and Complaint would be analogous to a claim for unliquidated damages, whereby Defendants would be entitled to present evidence in their own defense at the trial, including the right to cross-examine Plaintiffs' witnesses, and to present their own evidence on the matters at issue.

3.

If permitted to cross-examine Plaintiffs' witnesses, and to adduce evidence on their own behalf, Defendants could, successfully, establish the following:

(a) That most, if not all of the Plaintiffs reside at distances of many miles away from the animal shelter located on Miller Bottom Road.

(b) That most, if not all Plaintiffs have not suffered any actual injury, but their concerns are merely speculative or contingent, by reason of Plaintiffs' concerns as to continued growth and expansion, in the future, of the animal population at the aforesaid animal shelter.

(c) That any injury suffered by most, if not all Plaintiffs has been only such as would affect a person of fastidious taste, and would not affect an ordinary reasonable person;

(d) If permitted to testify and adduce evidence in their own behalf, Defendants could establish that there

is no real hazard or injury affecting the Plaintiffs by reason of the animal shelter, insofar as noise, odor, health hazards, or any other related issues and claims asserted by Plaintiffs through the testimony of residents who live nearer to the animal shelter than do the Plaintiffs; that the noise generated by barking dogs has not and cannot affect the Plaintiffs' lives, safety, or welfare in any manner constituting a private or public nuisance under Georgia law;

(e) That the only time any substantial amount of noise is generated at the animal shelter (by barking), is when an ambulance siren stimulates barking, which occurs no more frequently than once a week and, even in those instances, the barking noise is not sufficient to reach the Plaintiffs' homes so as to constitute a private or public nuisance under the law.

4.

If Defendants are not permitted to cross-examine Plaintiffs' witnesses and are, further, not permitted to present evidence in their own defense, they will be deprived of due process of law, and equal protection of the law, pursuant to the Georgia and United States Constitutions.

5.

Defendant Gerald Fields has no ownership interest in the subject property on Miller Bottom Road, nor has he any control.

* * *

APPENDIX, PART IV

TRIAL PROCEEDINGS, MARCH 9, 1987

* * *

(p. 2) The Court: With reference to the matter, I think we find ourselves in this posture. There was an Order entered February 26th, which struck the pleadings of the defendant in this matter. At this time the Court's plan is to hear testimony from the plaintiff to substantiate their position if it can be substantiated, and this Court will hear that.

The Court does not intend to hear any testimony from the defendant, nor will the defendant have the right to participate so far as examination of witnesses or taking any active status. I will allow the defendant, Mr. Sharony, to make whatever notation you might want to as to rulings of the Court at this time on this procedure, but I want to get it clear before we begin. I will hear from you.

Mr. Sharony: If it please the Court, the comments made by the Court confirm the understanding we had since we were notified by the Court before the weekend. Your Honor, we did file on Friday three motions which I would like to inquire of the Court whether we could mention those three Motions. One was a Renewed Amended Motion to Recuse and Change of Venue and another to Set Aside the Default and Continuance and the other to allow the defendant to cross-examine and present evidence. To perfect the record I would like to (p. 3) the motions were filed and I could briefly address the Court as to each motion, if the Court would allow.

The Court: These motions are a continuation of your pleadings, are they not? The pleadings you filed in the answer to the main suit, didn't you cover all those things in your pleadings?

Mr. Sharony: Not completely. The original motion we filed to change venue was not technically styled as Motion to Recuse but styled as a Motion to Change Venue and did not have an affidavit attached.

In view of the Court's ruling on February 26th we felt that to perfect the record we should amend that and add an affidavit to it, but the contents and substance of the affidavit and renewed motion is substantially the same as the previous Motion to Change Venue, and I am in agreement that the substance of the renewed motion is not different. Just the style and attachment of the affidavit.

The Court: I covered the change of venue in the previous order.

Mr. Sharony: Yes.

The Court: I think I covered the recusal in this Order.

Mr. Sharony: As dicta you did.

The Court: In looking at those motions, I (p. 4) don't believe I had time to rule on them yet, but did not strike the Court as raising such new issues that it required immediate examination of it. I am—I think you can rely that the Court will deny your motion on the three. I have just not been able to do it in a formal order.

Mr. Sharony: May I perfect the record?

The Court: Yes.

Mr. Sharony: It's—I appreciate the Court's permission to address the record. It's my understanding that the defendant's pleadings have been stricken by reason of nonappearance on oral deposition. In connection with that, it's my understanding the Court has granted the plaintiff's Motion for Protective Order.

The Court: I have not signed it, but it will be granted. I have granted it but not gotten the formal Order out.

Mr. Sharony: It's also my understanding that because of the defendant's pleadings being stricken that the defendant will not be permitted to participate in this trial by cross-examination of witnesses or by presenting testimony and witnesses in their own defense in connection with the allegations in the complaint.

In connection with that, Your Honor, we suggested in our motion—this is the recent motion (p. 5) that we filed, directed for the Court's discretion is our suggestion that discovery could be had by other means by the plaintiffs in connection with the discovery sought by plaintiff, such as by deposition questions, that is interrogatories or deposition by telephone, but those alternative means, Your Honor, if the Court considered those would necessarily require a continuance of the trial, and we asked the Court for a limited continuance of 30 days or less if the Court felt that it would be appropriate to allow these alternative means of discovery that could be complied with.

In connection with that, we felt that the defendant's deposition really should not be essential by any means for the plaintiffs to establish allegations for nuisance, whether or not there was a nuisance to plaintiff would depend on the impact that the animal shelter has on the plaintiffs as

their testimony and subject, of course, to any defense, but we reiterate this claim that the defendant's deposition, although we feel would be insignificant, we would be prepared to furnish information by other means other than oral deposition in person. And we feel, Your Honor, that this matter did address itself to your discretion insofar as conduct and discovery.

The Court: Let me say this. This Court is (p. 6) not going to take any alternative measures to protect the position of the Fieldses who are fugitives of the Court and for this Court to do this to protect their interest is beyond the stretch of imagination.

I am not trying to tell the plaintiffs how to handle the case. They have the right to depositions and discovery and this Court will not dictate how they do it. I overrule any motions you might have to that, and I think I made it abundantly clear in Orders I have previously issued. To say they have other methods of discovery, they may have, but they have their choice and the Court has not found it unreasonable and I would not entertain any motion or discussion pertaining to alternatives or continuance of this hearing for the purpose of trying to work out any alternative method.

Go ahead. I just wanted to get that in to start with.

Mr. Sharony: I do believe it's within the Court's discretion, and as a last point on this issue, we feel the whole issue is based upon the defendant Fieldses not appearing in person by reason of circumstances well-known to the Court and well-known to the plaintiffs and their counsel and we feel if the defendant Fieldses were in the status of being fugitives, as has been referred to, that that and I

(p. 7) submit this for your consideration, just because a person is a fugitive to one matter or one situation does not make property rights alleging civil rights of that person free game insofar as any other matters.

For instance, if a person were a fugitive and had a car financed by the finance company and the loan was in default, the finance company still have to comply with the law and due process in the manner it sought to repossess that car or any property of the fugitive.

I submit for the Court's consideration just because a fugitive in another matter does not mean constitutional rights and right to due process can be disregarded by other parties in another case, and that's basically our constitutional argument we raised in the recent motion.

The third motion is to allow us to cross examine and present evidence and we make an offer of proof and I would like to inquire if the Court would allow us to make an offer of proof at this time on the record as to what the evidence would show by way of defense and cross-examination and independent testimony if the defendant were permitted to do so. We outlined in our motion generally what our evidence would show.

I would like to state, Your Honor, if (p. 8) permitted to cross examine the plaintiff's witnesses and introduce evidence on behalf certain facts and circumstances would be tendered into evidence. If I could I would like to outline what those circumstances would be.

The Court: No, sir, the Court will not permit you to outline what you expect to show had you been allowed to present your case. The Court has striken the pleadings

and the position of the defendant in this case so far as the Court is concerned would be that of an observer of what takes place, but to allow you to state what you intend to show would be almost going around the Order that the Court has signed because the Court—if you have no pleadings before the Court the Court is not concerned with taking up the Court's time with what you would have done had you been in Court and had the answer been filed. The Court will not allow that.

I am here to hear from the plaintiffs in the matter as to whether or not they have a case for relief they are seeking. I will let you complete the record as to objections to procedure but not going to what procedure might be.

Mr. Sharony: Thank you. As I understand the Court's ruling, the defendant's pleadings having been (p. 9) stricken, the defendants are merely observers or spectators and have no right to make an offer of proof as a party would as a participate—

The Court: That's correct. I know there are cases on defaults and that with unliquidated damages and no answer filed or any type civil action ordinarily I've got the right—the Court takes the position this is an entirely different situation. To allow you to do that would be the same—would be no reason to have struck your pleadings if the Court is going to allow you to participate in the case from the standpoint of discussing whether or not the plaintiff made out a case, because you would do nothing more than that if you were a defendant before the Court and your pleadings were in life. The Court will not accept that.

Mr. Sharony: I would like to take the opportunity to do what the Courrt suggested on the objection.

The Court: You may do that.

Mr. Sharony: To the defendant not being allowed to participate and cross examine witnesses as these rulings being in violation of the defendant's right to trial by jury as has been referenced in the previous motion and also being a violation under the Georgia Constitution Article One, Paragraph One and (p. 10) United States Constitution Amendments V and XVI as to Defendants right to due process of the law, and furthermore to the defendant's right to equal and impartial and complete protection to their person and property see Georgia Constitution Article I, Section I, Paragraph II, and United States Constitution Amendment XVI. Thank you.

The Court: All right, Mr. Henderson.

Mr. Henderson: By way of protecting the record in—I would like to address one point.

The Court: You may address what you want.

Mr. Henderson: I am particularly protective of Mr. Sharony's motion wherein he was averring that you went beyond discretion in striking the pleadings and stated three cases that stood—the first one was Lassiter, Cook vs. Lassiter that said you can't strike the pleadings unless you find willfulness on the part of the defendant in not showing up and he averred that apparently that was not so.

I want to point out for the record that the hearing was held on February 11th where this precise exact issue was taken up and His Honor, the Fieldses having not showed up on behalf of it's individually or corporation at

the January 6th deposition was given additional opportunity on February 26th to appear so as

* * *

APPENDIX, PART V

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO.
	)	86-CV-1934
ANNE P. FIELDS, et al.,	)	(Filed
	)	March 9, 1987)
Defendants.	)	

ORDER

The Plaintiffs' Motion for Protective Order having been filed on February 24, 1987, and after consideration thereof the court finds as follows:

* * *

On said date, the Defendants did not appear for their depositions and an Order subsequently issued of this court striking their defensive pleadings. The Defendants still maintain their fugitive status.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following conclusion of law:

The Scheduling Order entered by this court on December 2, 1986, was entered to govern the parties pre-trial preparations. The requirement that all motions be filed on or before January 30, 1987, necessarily meant that the

discovery period in this case would end on that date. Therefore, the Defendants' Notice of Oral Deposition is untimely, and accordingly, the Notice of Oral Depositions could not be enforced even if same were otherwise valid.

The court finds that the Defendants' total failure to respond to the Plaintiffs' lawful discovery and their failure to institute discovery prior to the time for filing Motions or to even move for an extension of discovery at the time of the hearing on February 11, 1987, is in an abuse of the discovery process under the Civil Practice Act which entitles the Plaintiff to protective relief from the court.

The court further finds that the Defendants' Notice of Oral Deposition is defective under O.C.G.A. Section 9-11-30 since same does not specify the time for each of the Plaintiffs'

* * *

APPENDIX, PART VI

IN THE SUPERIOR COURT OF ROCKDALE COUNTY STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO.
	)	86-CV-1934
ANNE P. FIELDS, et al.,	)	(Filed
	)	March 11, 1987)
Defendants.	)	

ORDER

The above styled case having come before the Court on March 9, 1987, the day originally scheduled for trial of this case, but now on the issue of judgment by default, and after hearing testimony and evidence from the Plaintiffs and argument of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACTS

On August 15, 1986, the Plaintiffs filed their Complaint for Abatement of Nuisance. Defendants answered the Plaintiffs' Complaint on or about November 6, 1986. Defendants' Answer admitted jurisdiction, venue and proper service of process. Therein, the Defendants further admitted that Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc. own, operate and manage an animal refuge on property located on or near Miller Bottom Road in Rockdale County, Georgia.

On February 16, 1987, after previously having heard argument from counsel for both parties and having given the Defendants an opportunity to explain their failure to appear as required by law, the Court entered an Order finding that the Defendants willfully failed to appear for their depositions as properly scheduled and noticed by the Plaintiffs for January 6, 1987. It was further ordered that the Defendants' Answer would be stricken pursuant to O.C.G.A. Section 9-11-37(d) if the Defendants failed to appear for their depositions on or before 9:00 o'clock a.m., February 26, 1987, at the Rockdale County Courthouse. The Defendants did not appear at the designated time or place either individually or through counsel, and on February 26, 1987, the Court entered an Order striking all pleadings filed on behalf of the Defendants Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc.

The Court further finds that the Defendants Anne P. Fields and Gerald Fields are fugitives from this State and all appearances in this case have been through legal counsel. There is no issue of damages in this case.

The Court further finds that Defendants Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc. own, operate and manage an animal refuge on property located on or near Miller Bottom Road in Rockdale County, Georgia. At the present time, said Defendants are keeping approximately five hundred (500) cats and dogs on said property. The number of animals on the property causes loud noises to emanate therefrom. There is continuous barking and yelping at all hours of the day and night originating from the Defendants' property. Noxious odors also emanate from the property. There has been a substantial increase in the numbers of stray

dogs roaming about the Plaintiffs' neighborhood since the inception of the animal shelter. These dogs have tended to band together in packs. The Court finds that these stray dogs constitute a threat to the persons and property of the Plaintiffs.

All Plaintiffs reside within approximately a three mile radius of the Defendants' property. Of the six Plaintiffs who testified at the final hearing, all lived within a one and one-half (1½) mile radius of the shelter. The Court also finds that the Plaintiffs have suffered special injury as a result of the Defendants' maintenance of the animal shelter. The Court finds that some Plaintiffs have necessarily kept their windows closed in the summertime in an attempt to lessen the annoyance caused by the noise and odor emanating from the Defendants' property. Most Plaintiffs have had to limit their outside activities because of the noise created by animals kept at the shelter. Other Plaintiffs have lost considerable amounts of sleep due to the loud barking, yelping and other noises coming from the property. Some Plaintiffs have been attacked by the stray dogs now present in the area. Others have lost livestock to the strays. The Court finds that the increase in strays is directly related to the Defendants' maintenance of the animal shelter on said property. The Court finds that the real property of at least one Plaintiff has become less marketable as a result of the presence of the animal shelter. The Court finds that the Defendants intend to move more animals to the subject property which would increase the noise level, odor and presence of stray dogs above that which now exists. The Court finds that no alternate remedy is available short of closing the shelter.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the Court makes the following conclusions of law:

1.

This Court has jurisdiction of the parties and of the subject matter of this litigation.

2.

Venue is proper in this case.

3.

The issue before the Court on this default hearing is whether under the facts presented through live testimony of the Plaintiffs and taking the allegations of the Plaintiffs' Complaint as admitted entitle Plaintiffs to the relief sought.

4.

The noise, odor and attraction of stray dogs created by the animal shelter located on Defendants' property on Miller Bottom Road in Rockdale County, Georgia interferes with the quiet enjoyment of the Plaintiffs' property.

5.

The injuries suffered by the Plaintiffs is such as would affect an ordinary reasonable person and not only those of fastidious taste.

6.

The Defendants' interference with the Plaintiffs' rights to the peaceful and quiet enjoyment of their real

property constitutes a nuisance, both public and private, under Title 41 of the Official Code of Georgia Annotated.

7.

The appropriate remedy for the abatement of the aforesaid nuisance is the closing of said shelter.

WHEREFORE, IT IS HEREBY ORDERED as follows:

1. that judgment be entered for the Plaintiffs and against the Defendants, Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc.;

2. that the maintenance of the animal shelter on Defendants' property located on or near Miller Bottom Road in Rockdale County, Georgia be and hereby is declared a nuisance;

3. Defendants are Ordered to abate said nuisance and to close and to cease to operate said animal shelter thereon; and

4. Defendants are to remove all animals from the property within thirty days (30) from the date of this Order.

SO ORDERED this 11th day of March, 1987.

/s/ Clarence R. Vaughn, Jr.
Clarence R. Vaughn, Jr., Judge
Rockdale Superior Court
Rockdale Judicial Circuit

APPENDIX, PART VII

In the Supreme Court of Georgia

Decided: Sept. 9, 1987

447.17. FIELDS, et al. v. ALLEN, et al.

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur.

APPENDIX, PART VIII

(duplicate)

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 9/24/87

The motion for a rehearing was denied today:
Case No. 44717, Fields et al. v. Allen et al.

Yours very truly,

/s/ Mrs. Joline B. Williams, Clerk
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX, PART IX

GA. CONST. Art. 1, § 1, ¶ 1

Paragraph I. Life, liberty, and property

No person shall be deprived of life, liberty, or property except by due process of law.

APPENDIX, PART X

GA. CONST. Art. § 1, ¶ 2

Paragraph II. Protection to person and property; equal protection.

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

APPENDIX, PART XI

GA. CONST. Art. 1, § 1, ¶ 12

Paragraph XII. Right to the courts.

No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.

APPENDIX, PART XII

256 Ga. 338

LIFE FOR GOD'S STRAY ANIMALS, INC. et al.

v.

NEW NORTH ROCKDALE COUNTY HOMEOWNERS ASSOCIATION et al. (Two Cases).

Nos. 43739, 43815.

Supreme Court of Georgia.

Oct. 22, 1986.

Contemnors appealed from order of the Superior Court, Rockdale County, Clarence R. Vaughn, J., finding them in contempt. The Supreme Court, Bell, J., held that: (1) flight of two of the contemnors divested them of right to appeal; but (2) court had found remaining contemnor guilty of criminal contempt; and (3) it was improper to make that finding without applying the beyond-reasonable-doubt standard.

Dismissed in part and vacated and remanded in part.

Hunt, J., concurred in the judgment only.

Gregory, J., dissented.

Michael Kennedy McIntyre, Abraham A. Sharony, Abraham A. Sharony, P.C., Atlanta, for Life For God's Stray Animal's, Inc., et al.

John A. Nix, Maddox, Starnes & Nix, Conyers A. Lee Parks, Meals, Kirwin, Goger, Winter & Parks, P.C., Atlanta, for New North Rockdale Homeowners Ass'n, et al.

BELL, Justice.

These appeals are the latest in a series of seven appeals[1] arising from a controversy in which neighboring landowners of an animal shelter are attempting to force the removal of the shelter from their environs. Ann P. and Gerald Fields, appellants in Appeal No. 43815, operate the shelter, and Ronald Lee Denney, appellant in Appeal No. 43739, is the foreman of the shelter. The Fields and Mr. Denney seek review of judgments holding them in contempt. For the following reasons we dismiss Appeal No. 43815, and vacate and remand Appeal No. 43739.

Appeal No. 43815. Ann P. and Gerry Fields

1. The Fields were held in civil contempt and ordered jailed until they purged themselves of their contempt, and thereafter failed to report to jail as ordered, and cannot presently be located. We hold that their flight constitutes an open defiance of the authority of the courts of this state, and operates to divest them of the right to appeal the judgment of the superior court. See generally *Yates v. Brown*, 235 Ga. 391(1), 219 S.E.2d 729 (1975), and special concurrence of Hill, J.

Appeal No. 43739. Ronald Lee Denney

2. The superior court held Mr. Denney in contempt and ordered him to report to the Rockdale County Jail to serve ten days imprisonment. By imposing this uncondi-

---

1. The first two appeals were determined by this court in a published opinion, *Life for God's Stray Animals, Inc. et al. v. New North Rockdale County Homeowners Assoc., et al.*, 253 Ga. 551, 322 S.E.2d 239 (1984). The subsequent appeals prior to the present appeals were affirmed by this court without opinion pursuant to Rule 59.

tional imprisonment for a specified period, the court found appellant guilty of criminal contempt. *Ensley v. Ensley,* 239 Ga. 860, 238 S.E.2d 920 (1977). "*In re Crane,* 253 Ga. 667, 670 (324 SE2d 443) (1985) this courth eld "that the standard of proof in criminal-contempt cases is the beyond-reasonable-doubt standard.' " *In re Irvin,* 254 Ga. 251, 255(2), 328 S.E.2d 215 (1985). Our examination of the record in this case does not reveal any ruling or finding in which the trial judge applied the beyond-reasonable-doubt standard. We therefore vacate the judgment and remand the case to the trial court for application of that standard. See *In re Irvin,* 254 Ga. at 256-57, 328 S.E.2d 215.

Appeal No. 43815 is dismissed.

All the Justices concur, except WELTNER, J., disqualified, and HUNT, J., who concurs in the judgment only.

In Appeal No. 43739, the judgment of the trial court is vacated and remanded to the trial court for further disposition not inconsistent with the opinion.

All the Justices concur, except WELTNER, J., disqualified; HUNT, J., who concurs in the judgment only; and GREGORY, J., who dissents.

APPENDIX, PART XIII

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO.
	)	86-CV-1934
ANNE P. FIELDS, et al.,	)	
Defendants.	)	

NOTICE TO TAKE DEPOSITION

TO: Anne P. Fields
3771 Miller Bottom Road
Loganville, Georgia 30249

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 26 and 30 of the Georgia Civil Practice Act, Counsel for the Plaintiffs will proceed to take the deposition of Anne P. Fields, at 10:00 o'clock, a.m., on January 6, 1987, at the offices of Moffett and Henderson, P.C., 1916 Piedmont Road, N.E. Atlanta, Georgia, 30324, (or at such other place and time as is mutually agreed upon by counsel), upon oral examination and discovery, and continuing from day to day thereafter until completed. The deposition will be taken before an officer duly authorized by law to administer oaths and to take depositions for use in accordance with law.

RESPECTFULLY SUBMITTED, this 5 day of December, 1986.

MOFFETT AND HENDERSON, P.C.
Attorneys for Plaintiffs

/s/ John Walton Henderson, Jr.

/s/ H. Brian Sams

1916 Piedmont Road, N.E.
Atlanta, Georgia 30324-4187
(404) 658-9950

(Certificate of Service omitted in printing)

APPENDIX, PART XIV

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO.
	)	86-CV-1934
ANNE P. FIELDS, et al.,	)	
Defendants.	)	

NOTICE TO TAKE DEPOSITION

TO: Gerald Fields
3771 Miller Bottom Road
Loganville, Georgia 30249

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 26 and 30 of the Georgia Civil Practice Act, Counsel for the Plaintiffs will proceed to take the deposition of Gerald Fields, at 11:00 o'clock, a.m., on January 6, 1987, at the offices of Moffett and Henderson, P.C., 1916 Piedmont Road, N.E. Atlanta, Georgia, 30324, (or at such other place and time as is mutually agreed upon by counsel), upon oral examination and discovery, and continuing from day to day thereafter until completed. The deposition will be taken before an officer duly authorized by law to administer oaths and to take depositions for use in accordance with law.

RESPECTFULLY SUBMITTED, this 5th day of December, 1986.

MOFFETT AND HENDERSON, P.C.
Attorneys for Plaintiffs

/s/ John Walton Henderson, Jr.

/s/ H. Brian Sams

1916 Piedmont Road, N.E.
Atlanta, Georgia 30324-4187
(404)658-9950

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1019

(2)

In The
Supreme Court of the United States
October Term, 1987

ANN P. FIELDS, GERALD FIELDS and
LIFE FOR GOD'S STRAY ANIMALS, INC.,
Petitioners,

v.

GAYLE ALLEN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION

JOHN WALTON HENDERSON, JR.
MOFFETT AND HENDERSON, P.C.
1916 Piedmont Road, N.E.
Atlanta, Georgia 30324-4187
(404) 658-9950

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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60pgs.

QUESTION PRESENTED

Whether a Writ of Certiorari should issue to the Supreme Court of Georgia to review its decision affirming the judgment of the Superior Court of Rockdale County which was entered upon default after the Court struck the Petitioners' pleadings for their willful failure to appear for their properly noticed depositions.

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A. *Georgia law provides for the dismissal of the Petitioners' defensive pleadings for their willful failure to appear for their properly scheduled depositions.* 4

B. *No grounds exist for the Petitioners' claim that they were deprived of their day in court under Georgia law* 7

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STATUTES INVOLVED

The texts of the following statutes relevant to the determination of the present case are set forth in the Appendix: failure to make discovery, motion to compel, sanctions, and expenses, O.C.G.A. § 9-11-37.

———o———

STATEMENT OF THE CASE

Respondents take exception to the Petitioners' statement of the Case. Respondents contend that many of the Petitioners' allegations are conclusory and unsupported. Others are grossly inaccurate.

In August 1986, Respondents filed a civil lawsuit against the Petitioners alleging that the Petiitoners' use of their property as an animal shelter constituted a public and private nuisance under Georgia law. (App. 32).

Upon the joining of the issue, Respondents undertook discovery by noticing the Petitioners for oral depositions pursuant to Georgia discovery rules. O.C.G.A. § 9-11-30. The depositions of Ann P. Fields and Gerald Fields were to be taken both individually and in their corporate capacities as officers, directors, shareholders and employees of Life For God's Stray Animals, Inc., (LFGSA). (App. 3). Subsequent to the Petitioners' failure to appear or seek a protective order as provided by Georgia law, (O.C.G.A. § 9-11-26) Respondents moved the trial court for an order striking their defensive pleadings and entering judgment by default pursuant to O.C.G.A. § 9-11-37. (App. 9). After a hearing on the matter, the trial court

granted the motion and ordered the Petitioners to appear for their depositions on February 26, 1987. (App. 14). Petitioners again failed to appear. (App. 23, 26). The trial court thereafter entered an order striking the Petitioners' defensive pleadings. (App. 26). On March 9, 1987, the trial court held a default hearing, not a bench trial as Petitioners contend. (App. 32). A default judgment was thereafter entered from which the Petitioners appealed. (App. 36). A penalty for frivolous appeal was imposed upon the Petitioners by the Supreme Court of Georgia. (App. 41).

The Petitioners are mistaken as to their contention that a hearing on the issue of willfulness was not held prior to the entry of the order striking their pleadings. In fact, such a hearing was held on February 11, 1987. (App. 9).

Petitioners contend that the trial court's denial of their Amended Motion to Recuse and to Change Venue and Motion to Set Aside Default and for Continuance on Constitutional Grounds and Motion to Allow Defendants to Cross-examine and Present Evidence, is evidence of the trial court's alleged improper motive in granting the motion to strike the Petitioners' defensive pleadings. Petitioners fail to mention that on December 2, 1986, the trial court entered a scheduling order governing the time for discovery and for filing motions in the case, wherein the court ordered that all motions be filed by February 1, 1987. (App. 1). All of the motions listed in subparagraph C of page 4 of the Petitioners' Brief were filed after the deadline imposed by the scheduling order. (App. 39). Although two of the Motions were related to the

default, the Amended Motion to Recuse was untimely and was duplicative of a previously denied motion. (App. 39).

SUMMARY OF ARGUMENT

Contrary to the Petitioners' argument, the trial court properly entered a default judgment as a result of the Petitioners' willful refusal to meaningfully participate in the case at the trial level. The Petitioners confuse the fact that their fugitive status is evidentiary of their willful refusal to appear for their depositions with what they allege is an improper motive of the trial court.

The Petitioners were not deprived of due process in the trial court. Petitioners were represented by counsel and were given the opportunity to be heard at an oral hearing prior to the entry of the order striking their defensive pleadings.

The Petitioner, LFGSA, was properly subject to the discovery sanction in that the depositions of Ann P. Fields and Gerald Fields were scheduled both in their corporate and individual capacities. Moreover, the Petitioners are now precluded from raising this argument which is raised here for the first time.

The Petitioners' willful refusal to meaningfully participate in the case at the trial level resulted in the entry of a default judgment against them. In refusing to participate in discovery and in the case in general, the Petitioners abandoned their right to participate upon entry of default. Since no monetary damages were sought, only

that of equitable relief (abatement of the nuisance), the Petitioners were not entitled to present evidence or cross-examine witnesses during the default hearing.

———o———

ARGUMENT

THE DECISION OF THE TRIAL COURT, AFFIRMED BY THE SUPREME COURT OF GEORGIA, WITH PENALTY FOR FRIVOLOUS APPEAL, WAS A LEGITIMATE IMPOSITION OF DISCOVERY SANCTIONS FOR THE PETITIONERS' WILLFUL FAILURE TO MEANINGFULLY PARTICIPATE IN THE CASE AT THE TRIAL LEVEL.

A. Georgia law provides for the dismissal of the Petitioners' defensive pleadings for their willful failure to appear for their properly scheduled depositions.

The Official Code of Georgia Annotated Section 9-11-37(d) states in pertinent part as follows:

> "If a party or an officer, director, or managing agent of a party or a person designated . . . to testify on behalf of a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just; and, among others, it may take any action authorized under subparagraphs (b)(2)(A) through (b)(2)(C) of this Code section."

Subparagraph (b)(2)(C) of O.C.G.A. § 9-11-37 provides that a court may enter:

> "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or

any part thereof, or rendering a judgment by default against the disobedient party. . . ."

Under the facts of this case, there is no question that the Petitioners were properly noticed for their depositions and blatantly refused to appear. No objection to the notices was made in the trial court. (App. 12). Petitioners now allege that LFGSA was not party to the sanction. This is simply not the case. It is clear that Ann P. Fields and Gerald Fields were noticed for their depositions in their individual and corporate capacities. (App. 3). Ann Fields is an officer and director of LFGSA. (App. 5). Secondly, Petitioners' counsel's failure to object in the Court below constitutes a waiver of any objection. Moreover, since the issue was not raised in the court below, it cannot be raised for the first time in this application for certiorari. *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed 1231, *rehearing denied* 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed 759.

The Petitioners' main argument alleges that the dismissal sanction was imposed as punishment for the Petitioners' civil contempt in another case. It is true that the Petitioners were held in civil contempt in another case and that they are fugitives of the State of Georgia. This fact is evidentiary of their willful refusal to attend their depositions. Apparently, the Petitioners expect the court to excuse their failure to participate in the case because they are fugitives of the State. Petitioners cannot show that they were treated any differently than any other litigant who refuses to participate in the judicial process by not attending his duly noticed deposition. Nor do the Petitioners realize, as the trial court did, that to

allow the Petitioners to participate in the case at their leisure would be manifestly unjust to the Respondents.

In short, Petitioners fails to show any evidence of an improper motive which deprived them of due process in the trial court's dismissal of Petitioner's defensive pleadings.

Petitioners contend that they were not allowed a hearing on the issue of willfulness prior to the entry of judgment. This is simply untrue. On February 11, 1987, the trial court held a hearing at which Petitioners' counsel, but not the Petitioners, was present. (App. 9). At this hearing, both parties presented evidence and argument. (App. 9). As a result of this hearing, the court entered its order of February 11, 1987 finding:

> The Defendants maintain that they made an adequate response to the notice for deposition, given the December 19, 1986 letter from the Garland firm and Abe Sharony's statements on the record on January 6, 1987. However, these responses are not adequate. The parties failed to attend their own depositions. There was no motion for protective order by Defendants. There was no real attempt to work out an alternative date for the depositions. The Garland firm sent a letter to counsel for Plaintiffs prior to the scheduled deposition but then withdrew. Abe Sharony did not communicate with Plaintiffs until the scheduled deposition date. The bare statements that the parties are unavailable on the scheduled date, that they will be unavailable for weeks, but that they will be available sometime before the rapidly encroaching trial date, are insufficient....
>
> The Defendants wilfully failed to attend their own deposition. While times and places of deposition are often changed on request, here there is no good faith effort to change the time. Instead, there is an

> attempt to delay, without any effort by Defendants to schedule the deposition anew on a date certain. The failure to attend the deposition was a wilfull, conscious, intentional failure to appear by the Defendants, who are fugitives on a civil contempt in another case. The Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees is therefore granted in part as set forth below.

The fact that the court noted that Petitioners were fugitives from the State in that order is evidentiary of their willfulness in refusing to appear.

It is interesting to note that the Petitioners did not even file a motion for protective order which is provided for by Georgia law. O.C.G.A. § 9-11-26. Since the Petitioners undertook no prior action to protect against their non-appearance, they are estopped from arguing their discovery abuses should be excused.

B. No grounds exist for the Petitioners' claim that they were deprived of their day in court under Georgia law.

Because the dismissal of the Petitioners' defensive pleadings was a legitimate exercise of the Courts' discretion in addressing discovery abuses, the trial court did not deprive the Petitioners of their day in court. The right of access to the courts has no application to this case. This principle of justice assumes that the party claiming the right is willing to participate in the judicial process. Here, however, the Petitioners have totally abandoned their right and duty to participate in the case. If the Petitioners have been deprived of their day in court, it is the Petitioners who have deprived themselves.

No money damages were sought in this case. Respondents sought only equitable relief in the form of an abatement of the nuisance. Under Georgia law, the hearing on the default judgment required only that the court hear the Respondent's allegations, which the Court must accept as true and admitted. Upon hearing those admitted allegations the Court found that Respondents were entitled to the relief sought. *See, Times-Journal, Inc., et al. v. Jonquil Broadcasting Company, et al.*, 226 Ga. 673, 177 S.E.2d 64 (1970). In that case the court stated:

> "While in a civil action, not in equity, where the case is in default, the Plaintiff is entitled to a default judgment as a matter of law without the introduction of any evidence except as to unliquidated damages, yet in equity cases which involve harsher remedies a determination must be first made that admitting every allegation of the petition as true, the Plaintiff is entitled to the relief sought. This presents a question of law for the court, similar to prior adjudications on general demurrer, but without the presumptions against the pleader as was required by demurrer practice. Once such a determination has been made that, accepting the allegations of the Plaintiff's claim as true, he is entitled to a decree then such decree must be entered."

Thus, there was not an issue at the default hearing upon which the Petitioners were entitled to present evidence or to cross-examine witnesses. The Court was required to take the allegations of the Respondents' complaint as admitted and true. The sole question for the trial court's determination was whether taking such allegations as true, the Respondents were entitled to the relief sought.

Lastly, because the Petitioners refused to participate in the pretrial preparation of this equity case they were estopped from participating in the taking of the judgment upon entry of default.

CONCLUSION

Respondents submit that no question of Federal law has been presented which would justify the issuance of Writ of Certiorari to the Supreme Court of Georgia. The dismissal of the Petitioners' defensive pleadings and entry of default was a legitimate sanction imposed for the Petitioners' intentional discovery abuses in failing to appear for their properly noticed depositions. Moreover, Petitioners had no right to present evidence and cross-examine witnesses at the default hearing where all allegations of the Respondents were required to be taken as admitted and where the only issue before the court was whether the evidence presented entitled the Respondents to the relief sought.

RESPECTFULLY SUBMITTED, this 19th day of January, 1988.

MOFFETT AND HENDERSON, P.C.
Attorneys for Respondents

By: JOHN WALTON HENDERSON, JR.
Georgia Bar Number: 346000

1916 Piedmont Road, N.E.
Atlanta, Georgia 30324-4187
(404) 658-9950

APPENDIX, PART I

Joanne P. Caldwell
Clerk of Rockdale County Superior Court
Post Office Box 937
Conyers, Georgia 30207
(404) 922-7750

December 2, 1986

John W. Henderson, Jr.
H. Brian Sams
1916 Piedmont Road, N.E.
Atlanta, Georgia
30324-4187

Re: Walton-Newton-Rockdale County Homeowners Association, et al

vs

Life For God's Stray Animals, Anne P. Fields, Gerald Fields and Rockdale County, Georgia.
Civil Action Number 86-CV-1934

NOTICE OF HEARING

A Temporary Hearing being scheduled and held this day, in the Superior Court of Rockdale County, Judge Clarence R. Vaughn, Jr. presiding, the following directions were ordered from the bench:

1. Case to be continued to March 9, 1987 at 9:00 a.m.
2. All Motions will be filed by February 1, 1987 at 5:00 p.m.
3. All motions filed by February 1, will be heard on February 11, 1987.
4. Hearing on the 9th of March will take up the matter for complete relief as requested in the petition.
5. It will be a full Bench Trial.

6. There will be no Leave of Absence granted to any attorney in connection with this case.

7. There will be no granting or agreeing to any conflicts attorneys may have in other courts.

8. NO continuance shall be granted in this case unless providential cause is shown.

PLEASE NOTE THE CHANGE OF DATE ON THE BENCH TRIAL. IT WAS ORIGINALLY ANNOUNCED IN COURT THAT THE BENCH TRIAL WOULD BE MARCH 6. THAT WAS IN ERROR, THE BENCH TRIAL IS SET FOR MARCH 9, 1987 AT 9:00 A.M.

Sincerely,

/s/ Joanne Caldwell
Clerk Rockdale Superior Court

APPENDIX, PART II

IN THE SUPERIOR COURT OF ROCKDALE COUNTY, STATE OF GEORGIA

GAYLE ALLEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
versus	)	
	)	Civil Action
ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STRAY ANIMALS, INC. and ROCKDALE COUNTY, GEORGIA,	)	File Number 86-CV-1934
	)	
Defendants.	)	

These are the proceedings held in lieu of the depositions of Anne and Gerald Fields, which was taken by Barbara A. Van Buren, Deposition Officer, at 10:00 a.m. on January 6, 1987 at 1916 Piedmont Road, N.E., Atlanta, Georgia.

APPEARANCES:

BRIAN SAMS, ESQUIRE
JOHN HENDERSON, ESQUIRE
For the Plaintiffs
ABRAHAM SHARONY, ESQUIRE
For the Defendants

(p. 2) PROCEEDINGS

MR. SAMS: This was to be the deposition of Anne P. Fields, individually and in her capacity of an officer, director, shareholder and employee of the corporation, Life for God's Stray Animals, Inc. It is taken pursuant

to notice. It is now approximately 10:15. The deposition was scheduled for 10:00. Ms. Fields is not present. Moreover, after having talked with Mr. Abe Sharony, counsel for Ms. Fields and the corporation, I understand that she will not be appearing today. We've received a letter from The Garland Firm asking that her deposition be continued or reset. We've chosen not to do so because of the Court's requirements, which were set down in December of the previous year, setting forth discovery time periods and the special setting of the trial of this case. We feel it necessary to go forward with discovery as we propound it. Mr. Sharony?

MR. SHARONY: Yes. I am here on behalf of the would be deponents. Let me ask a question. It was my understanding that Mr. Gerald Fields' deposition was—

MR. SAMS: Right. I was going to talk about that in just a minute.

MR. HENDERSON: Do you want to just put it all together or do it—let's just put it altogether.

(p. 3) MR. SAMS: Okay. We had Mr. Gerald Fields scheduled at 11:00 this morning. We stand prepared to take his deposition, but we also understand that he will not be appearing either in his individual or corporate capacity either, but we stand ready to take his deposition at that time, if he were to appear.

MR. SHARONY: Okay. I do represent both Anne and Jerry Fields with respect to this matter here this morning, and having just recently been retained to do so, I will be filing a pleading noticing my appearance in this matter. Mr. Gerald Fields nor Ms. Anne Fields will

be here this morning. Incidentially, Mr. Gerald Fields has no corporate capacity, but he is an individual named in this lawsuit, but there is no corporate capacity with respect to Life for God's Stray Animals as far as Mr. Fields is concerned. Ms. Fields is an officer and director of the company. In the event the plaintiffs may decide—as was indicated in off-the-record discussion, there is a possibility the plaintiffs may pursue a Motion to Compel discovery in view of the deponents not appearing here this morning. I will ask the Court Reporter to mark as an exhibit the letter that Mr. Sams referred to, which is a copy of the letter dated December 19th from The Garland Firm. I'll ask the court reporter to mark that as Exhibit D-1.

(p. 4) (Document marked for identification as Defendant's Exhibit 1.)

The Court reporter just marked this December 19th letter as Defendant's Exhibit 1. As set forth in this letter, we have suggested to the Plaintiffs and have requested the plaintiffs in an attempt to resolve this discovery dispute and in accordance with the Uniform Rules that the plaintiffs consider going forward with their other trial preparations with the understanding that Anne and Jerry Fields, as soon as they return to Georgia, will make themselves available prior to the trial, within a reasonable time, allowing the plaintiff's a reasonable opportunity to take their deposition, but they are not here today and as far as I know they will not be here for the next several weeks. It is our position that whatever the plaintiffs must prove to establish their case at trial, that most of that evidence should be forthcoming from witnesses and evidentiary sources other than the would be deponents here this morn-

ing. Insofar as technical matters, such as ownership of the property, those matters can be either stipulated or proven by certified copies of deeds, which again, can be authenticated and introduced by sources other than the defendants, so it is our position that it is not essential to the plaintiffs' (p. 5) case to proceed with taking the deponents' depositions at this particular time for the foregoing reasons and with the understanding and willingness by these deponents to make themselves available for deposition just as soon as they return to the jurisdiction, which we all hope will be in the very near future. That's all I want to say.

MR. HENDERSON: That's all we've got, unless you have something else.

MR. SAMS: We are reserving any arguments we have in support of any motion that we bring for the brief and for the Court at the proper time.

MR. HENDERSON: Okay.

MR. SHARONY: Thank you, ma'am.

(p. 6) CERTIFICATE

STATE OF GEORGIA
COUNTY OF FULTON

I, Barbara A. Van Buren, being a Certified Court Reporter and Notary Public in and for the State of Georgia, certify that the foregoing transcript is a true and complete record of the said proceedings; that I am neither a relative nor employee nor attorney nor counsel of any of the parties nor a relative nor employee of such attorney or counsel nor financially interested in the action.

WITNESS MY HAND AND SEAL at Atlanta, Fulton County, Georgia, this the 23rd day of January, 1987.

/s/ Barbara A. Van Buren
Barbara A. Van Buren, C.C.R.
Notary Seal
Certificate No. B-322
C.C.R. Seal

APPENDIX, PART III

IN THE SUPERIOR COURT OF ROCKDALE COUNTY, STATE OF GEORGIA

GAYLE ALLEN, BOBBY ALLEN, GEORGE WILLIAM STEPHENS, ROBIN BENNETT, JOHN BENNETT, STEVE - WITTENMYER, SANDY WITTENMYER, JOE WILKINS, E. F. FORRESTER, RUBY FORRESTER, CHARLES B. ROTENBERG, BOB TRIVITT, DEBBIE TRIVITT, FRANK C. SNIPES, EULALIE LEVERETTE, DAVID LITTLE, BRENDA LITTLE, KEITH THOMAS, KENNY THOMAS, JOSEPHINE WATSON, T. R. CHASTAIN, BETTY J. CHASTAIN, W. S. CONNER, MARVIN DOW, LINDA DOW, JESSIE FORTNER, DELLA FORTNER, LUCILLE LAMAR, TOMMY WILKERSON, JUDY WILKERSON, JOHN WALTON HENDERSON, SR., HAROLD MACHEN, ALTON C. HENDERSON, INDIVIDUALLY and as THE WALTON-NEWTON-ROCKDALE COUNTY HOMEOWNERS ASSOCIATION,	)	CIVIL ACTION FILE NO. 86-CV-1934
Plaintiffs,	)	(Filed Feb. 16, 1987)
v.	)	

ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STSRAY ANIMALS, INC., ROCKDALE COUNTY, GEORGIA,	)
Defendants.	)

ORDER

The Plaintiffs in the above styled matter having filed a Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and For Attorneys' Fees, and the Defendants having filed a Motion to Dismiss Gerald Fields, and a Motion to Change Venue and Demand for Jury Trial, the motions came on regularly to be heard on February 11, 1987. After hearing, and after consideration of the entire record, the court enters the following order.

Note that Defendants, as used in this order, refers to Anne P. Fields, Gerald Fields, and Life for God's Stray Animals, Inc. Any references to Rockdale County, the other Defendant in the case, will specify Rockdale County explicitly.

As to the Defendants' Motion to Dismiss Gerald Fields, the motion was withdrawn at the hearing by counsel for Defendants, and is, therefore, no longer before the court.

As to the Defendants' Motion to Change Venue and Demand for Jury Trial, the motion must fail. Regarding the Defendants' demand for jury trial, see the cases of *Cawthon v. Douglas County,* 248 Ga. 760 (1982) and *Life for God's Stray Animals, Inc. v. North Rockdale County Homeowners' Association,* 253 Ga. 551 (1984). There is

no right to a jury trial in equity. A suit to enjoin a nuisance is in equity. In the instant case, the sole relief sought is the enjoining of a nuisance. The Defendants fail in their attempt to distinquish *Cawthon* and *Life for God's Stray Animals, Inc., supra,* from the instant case.

Regarding the portion of the motion requesting a change of venue, such a motion will not lie in a non-jury case. See O.C.G.A. Section 9-10-50. Even if the motion for change of venue had been appropriate in the instant case, Defendants' tender of newspaper clippings would have been an inadequate basis on which to grant the motion. Defendants do not make a motion for recusal; they have failed to meet the statutory and uniform superior court rule procedures for such a motion. Additionally, the time in which to make pretrial motions has passed. While Defendants have not made a motion to recuse, the court would take this opportunity to address a suggestion made by counsel for Defendants. Counsel for Defendants has suggested that it would be impossible to have a fair bench trial held by this court because of this court's knowledge of the previous history of the Defendants. The court simply notes that every judge deals with situations in which he or she has knowledge of a party's past history and prior actions. Judges frequently handle probation revocation hearings on defendants on whom they have previously imposed sentence after a jury trial, bench trial, or acceptance of a guilty plea. Judges frequently handle contempt proceedings in domestic matters after hearing the original divorce and earlier contempt proceedings. A judge is not disqualified from handling a matter because he is aware of a party's previous court appearances; to hold otherwise would be to cause paralysis in the judicial

system. But, to reiterate, Defendants have not made a motion to recuse; and, Defendants' Motion to Change Venue and Demand for Jury Trial lacks merit.

Finally, the Plaintiffs have made a Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees. On August 15, 1986, Plaintiffs filed their complaint. Defendant Rockdale County filed its answer on September 16, 1986. Defendants Anne P. Fields, Gerald Fields, and Life for God's Stray Animals, Inc. filed an answer on November 6, 1986. The matter was originally set down for hearing on December 2, 1986. However, counsel for Defendants (at that time, members of the Garland firm) requested a continuance, for time in which to prepare for trial, including time to complete discovery. The court set out a time table to govern the case. All motions weres to be filed by February 1, 1987, and heard on February 9, 1987. The case was specially set for trial on March 9, 1987.

Plaintiffs served notices to take the depositions of Anne P. Fields and Gerald Fields in their individual and corporate capacities. The depositions were scheduled for January 6, 1987. Counsel for Defendants, Janice Singer of the Garland firm, then sent a letter dated December 19, 1986 to counsel for Plaintiffs. The letter states that counsel for Defendants object to the taking of the oral depositions on the scheduled date, and that they requested that counsel for Plaintiffs consider resetting the depositions for a later date prior to trial. However, no motion for protective order was filed, and the Garland firm subsequently withdrew from the case.

On the date set for the deposition, Anne P. Fields and Gerald Fields did not appear. However, Abe Sharony, who had come into the case as counsel for Defendants, did appear. A copy of that transcript is affixed to this order. Note that Mr. Sharony did not offer a specific alternative date for the depositions, but did state that he did not think it would be possible to do them within the next several weeks. (T.p.4.)

The Defendants maintain that they made an adequate response to the notice for deposition, given the December 19, 1986 letter from the Garland firm and Abe Sharony's statements on the record on January 6, 1987. However, these responses are not adequate. The parties failed to attend their own depositions. There was no motion for protective order by Defendants. There was no real attempt to work out an alternative date for the depositions. The Garland firm sent a letter to counsel for Plaintiffs prior to the scheduled deposition, but then withdrew. Abe Sharony did not communicate with Plaintiffs until the scheduled deposition date. The bare statements that the parties are unavailable on the scheduled date, that they will be unavailable for weeks, but that they will be available sometime before the rapidly encroaching trial date, are insufficient.

O.C.G.A. Section 9-11-37(d) sets forth the possible consequences occasioned by a party's failure to attend at his own deposition.

> "If a party or an officer, director, or managing agent of a party . . . fails to appear before the officer who is to take his deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the

failure as are just; and, among others, it may take any action authorized under subparagraphs (b)(2)(A) through (C) of this (b)(2) Code section. . . ."

O.C.G.A. Section 9-11-37(b)(2)(C) states that "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party" is available as a sanction.

The Defendants raise the issue that the Plaintiffs did not seek a motion to compel Defendants to submit to a deposition, and that the Plaintiffs must do so before they may seek the sanctions set forth in O.C.G.A. Section 9-11-37(b)(2)(C). The Defendants' own attorney has stated that he believed the Defendants would be unavailable for depositions to be taken for several weeks. (See T.p.4). Given the quickly approaching motion hearing and trial dates, it was not necessary for Plaintiffs to do a futile thing, i.e., file a motion to compel, when they had been informed that the Defendants would be unavailable for several weeks.

But note that there need be no order to compel discovery as a basis to impose the sanctions provided for in O.C.G.A. Section 9-11-37(d), including striking a defendant's answer and entering default judgment. All that is required is a motion, notice and hearing, such as has occurred in the instant case. See *Cook v. Lassiter,* 159 Ga. App. 24 (1981); *Kruger v. Kruger,* 146 Ga. App. 461 (1978); *Interstate Fire Ins. Co. v. Mayer,* 147 Ga. App. 751 (1978).

The Defendants wilfully failed to attend their own deposition. While times and places of deposition are often changed on request, here there is no good faith effort to change the time. Instead, there is an attempt to delay, without any effort by Defendants to schedule the deposition anew on a date certain. The failure to attend the deposition was a wilfull, conscious, intentional failure to appear by the Defendants, who are fugitives on a civil contempt in another case. The Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees is therefore granted in part as set forth below.

IT IS ORDERED that:

1. Counsel for Defendants', Abe Sharony, withdrawal of Defendants' Motion to Dismiss Gerald Fields be reflected on the record;

2. The Defendants' Motion to Change Venue and Demand for Jury Trial is denied; and

3. The Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees is granted in part as follows. Upon the failure of Anne P. Fields or Gerald Fields, in their individual and corporate capacities, to attend their own depositions, scheduled at 9:00 o'clock a.m., February 26, 1987, at Rockdale County Courthouse, Conyers, Georgia, or at such *earlier* time as the attorneys for the parties may agree, all pleadings filed on behalf of Anne P. Fields, Gerald Fields, and Life for God's Stray Animals, Inc. will be stricken. In the event that Anne P. Fields and Gerald Fields attend their own depositions, Defendants' pleadings will not be

stricken. If Defendants' pleadings are stricken, the court will then hear from Plaintiffs such evidence and testimony as they put up to substantiate their case and to support their prayers for relief. The issue of attorney's fees is deferred for later determination.

SO ORDERED this 16th day of February, 1987.

/s/ Clarence R. Vaughn, Jr.
Clarence R. Vaughn, Jr., Judge
Rockdale Superior Court
Rockdale Judicial Circuit

EXHIBIT "A"

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, et al.,	) Civil Action File
	) Number 86-CV-1934
Plaintiffs	)
	)
versus	)
	)
ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STRAY ANIMALS, INC. and ROCKDALE COUNTY, GEORGIA,	)
	)
Defendants.	)

These are the proceedings held in lieu of the depositions of Anne and Gerald Fields, which was taken by Barbara A. Van Buren, Deposition Officer, at 10.00 a.m. on January 6, 1987 at 1916 Piedmont Road, N.E., Atlanta, Georgia.

APPEARANCES:

BRIAN SAMS, ESQUIRE
JOHN HENDERSON, ESQUIRE
FOR THE PLAINTIFFS

ABRAHAM SHARONY, ESQUIRE
For the Defendants

(p. 2) PROCEEDINGS

MR. SAMS: This was to be the deposition of Anna P. Fields, individually and in her capacity of an officer, director, shareholder and employee of the corporation, Life for God's Stray Animals, Inc. It is taken pursuant to notice. It is now approximately 10:15. The deposition was scheduled for 10:00. Ms. Fields is not present. Moreover, after having talked with Mr. Abe Sharony, counsel for Ms. Fields and the corporation, I understand that she will not be appearing today. We've received a letter from The Garland Firm asking that her deposition be continued or reset. We've chosen not to do so because of the Court's requirements, which were set down in December of the previous year, setting forth discovery time periods and the special setting of the trial of this case. We feel it necessary to go forward with discovery as we propound it. Mr. Sharony?

MR. SHARONY: Yes. I am here on behalf of the would be deponents. Let me ask a question. It was my understanding that Mr. Gerald Fields' deposition was—

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MR. HENDERSON: Do you want to just put it all together or do it—let's just put it altogether.

(p. 3) MR. SAMS: Okay. We had Mr. Gerald Fields scheduled at 11:00 this morning. We stand prepared to take his deposition, but we also understand that he will not be appearing either in his individual or corporate capacity either, but we stand ready to take his deposition at that time, if he were to appear.

MR. SHARONY: Okay. I do represent both Anne and Jerry Fields with respect to this matter here this morning, and having just recently been retained to do so, I will be filing a pleading noticing my appearance in this matter. Mr. Gerald Fields nor Ms. Anne Fields will be here this morning. Incidentally, Mr. Gerald Fields has no corporate capacity, but he is an individual named in this lawsuit, but there is no corporate capacity with respect to Life for God's Stray Animals as far as Mr. Fields is concerned. Ms. Fields is an officer and director of the company. In the event the plaintiffs may decide—as was indicated in off-the-record discussion, there is a possibility the plaintiff's may pursue a Motion to Compel discovery in view of the deponents not appearing here this morning. I will ask the Court Reporter to mark as an exhibit the letter that Mr. Sams referred to, which is a copy of the letter dated December 19th from The Garland Firm. I'll ask the court reporter to mark that as Exhibit D-1.

(p. 4) (Document marked for identification as Defendant's Exhibit 1.)

The Court reporter just marked this December 19th letter as Defendant's Exhibit 1. As set forth in this letter, we have suggested to the Plaintiffs and have requested the plaintiffs in an attempt to resolve this discovery dispute

and in accordance with the Uniform Rules that the plaintiffs consider going forward with their other trial preparations with the understanding that Anne and Jerry Fields as soon as they return to Georgia, will make themselves available prior to the trial, within a reasonable time, allowing the plaintiff's a reasonable opportunity to take their deposition, but they are not here today and as far as I know they will not be here for the next several weeks. It is our position that whatever the plaintiffs must prove to establish their case at trial, that most of that evidence should be forthcoming from witnesses and evidentiary sources other than the would be deponents here this morning. Insofar as technical matters, such as ownership of the property, those matters can be either stipulated or proven by certified copies of deeds, which again, can be authenticated and introduced by sources other than the defendants, so it is our position that it is not essential to the plaintiffs' (p. 5) case to proceed with taking the deponent's depositions at this particular time for the foregoing reasons and with the understanding and willingness by these deponents to make themselves available for deposition just as soon as they return to the jurisdiction, which we all hope will be in the very near future. That's all I want to say.

MR. HENDERSON: That's all we've got, unless you have something else.

MR. SAMS: We are reserving any arguments we have in support of any motion that we bring out the brief and for the Court at the proper time.

MR. HENDERSON: Okay?

MR. SHARONY: Thank you, ma'am.

EXHIBIT "A"

Law Offices
THE GARLAND FIRM
A Professiional Corporation
92 Luckie Street, N.W.
Suite 1000
Atlanta, Georgia 30303
404 577-2225

Edward T.M. Garland
James M. Campbell
Jan L. Harris
Robin Loeb Kurtzman
Donald F. Samuel
Victoria A. McFadyen
Charles G. Haldi
Janice A. Singer

Reublin A. Garland
(1903-1982)

December 19, 1986

John Walton Henderson, Jr., Esquire
Moffett & Henderson, P.C.
1916 Piedmont Road, N.E.
Atlanta, Georgia 30324

Dear John:

We have received your notices to take the oral depositions of Gerald Fields and Ann P. Fields, and herewith object to the taking of these oral depositions on January 6, 1987, and request that you consider resetting these oral depositions for some later date prior to the trial scheduled to take place in March of 1987, for the following reasons:

(1) Mr. Gerald Lee Fields is neither an officer nor a director of Life For God's Stray Animals, and has no proprietary interest in the subject property.

(2) Neither Mr. Fields, nor Mrs. Fields would be indispensable or even essential witnesses for your clients to establish their allegations contained in the Complaint. Therefore, please consider whether or not you could go forward with other trial preparations, at this time, and if you still wanted to take Ann and Jerry Fields' depositions before the trial, they certainly will make themselves available after they return to Georgia.

(3) Neither Ann nor Jerry Fields will be available for a deposition to be taken on January 6, 1987, since they are, to the best of our knowledge, outside the State of Georgia.

Within a few days you should be receiving our notice of withdrawal—please do not let that affect your decision in this matter.

Thank you for your consideration in this matter.

I am,

Very truly yours,
/s/ Janice A. Singer

JAS/wr
cc: Anne & Jerry Fields
Life For God's Stray Animals, Inc.
Abe Sharony
Clerk Superior Court Rockdale County

CERTIFICATE

STATE OR GEORGIA
COUNTY OF FULTON

I, Barbara A. Van Buren, being a Certified Court Reporter and Notary Public in and for the State of

Georgia, certify that the foregoing transcript is a true and complete record of the said proceedings; that Iam neither a relative nor employee nor attorney nor counsel of any of the parties nor a relative nor employee of such attorney or counsel nor financially interested in the action.

WITNESS MY HAND AND SEAL at Atlanta, Fulton County, Georgia, this the 23rd day of January, 1987.

/s/ Barbara A. Van Buren, C.C.R.
Notary Seal
Certificate No. B-322
C.C.R. Seal

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of Defendants' Response to Motion to Strike Pleadings and for Entry of Default Judgment by hand-delivering said copy to:

John Walton Henderson, Jr., Esquire
Moffett and Henderson, PC.
1916 Piedmont Road, N.E.
Atlanta, Georgia 30324-4187
Attorney for Plaintiffs

John A. Nix, Esquire
Maddox, Starnes & Nix
P. O. Drawer 1017
Conyers, Georgia 30207
Attorney for Defendant Rockdale County

This 11th day of February 1987.

/s/ Abraham A. Sharony

APPENDIX, PART IV

IN THE SUPERIOR COURT OF ROCKDALE COUNTY, STATE OF GEORGIA

GAYLE ALLEN and BOBBY ALLEN, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE NO. 86-CV-1934
ANN P. FIELDS, GERALD FIELDS and LIFE FOR GOD'S STRAY ANIMALS, Inc. and ROCKDALE COUNTY, GEORGIA,	)	
Defendants.	)	

• • • •

Appearance for the depositions of ANN AND GERALD FIELDS at the Rockdale County Courthouse on February 26, 1987 at 9:00 a.m. before Patricia Towns, Certified Court Reporter and Notary Public.

• • • •

COURT REPORTING SERVICES
P. O. BOX 774
CONYERS, GEORGIA 30207
(404) 922-7797

(p. 2) APPEARANCES OF COUNSEL

For the Plaintiffs:

MR. BRIAN SAMS,
Attorney at Law
Moffett and Henderson, P.C.
1916 Piedmont Rd., N.E.
Atlanta, Georgia 30324-4187

(p. 3) CONTENTS

Statement by Mr. Sams Page 4

(p. 4) PROCEEDINGS

MR. SAMS: Pursuant to The Court's Order of February 16, 1987, we're appearing here today for the deposition of Ann and Gerald Fields. We have searched the hallway and they're not here nor are they in the courtroom.

I have talked with or my partner in the law firm, John Henderson, has talked with Mr. Sharony, I believe, the 19th of February, and informed him at that time that he did not believe that Mr. and Mrs. Fields would be appearing today either individually or in the corporate capacities.

Since they are not here and it's approximately twenty minutes 'til ten, we would ask The Court at this time to strike their pleadings and enter a default judgment pursuant to The Court's Order of aforesaid date.

(Brief Pause.)

MR. SAMS: We're back on the record just for a minute. I would like just to make the addition that I have talked with or rather I called Mr. Abe Sharony's office yesterday afternoon to find out whether or not he was coming today so that we could discuss the Plaintiff's Motion For Protective Order that's pending with The Court.

(p. 5) I left a message with Mr. Sharony's office. He called my office later yesterday afternoon and left a message that he would not be appearing today and that he would be willing to discuss the Motion For Protective Order at a later date.

(Concluded.)

(p. 6) CERTIFICATE

STATE OF GEORGIA)
COUNTY OF NEWTON)

I hereby certify that the foregoing transcript of proceedings in the above-entitled matter, was taken by me;

I further certify that the transcript of proceedings was accurately reduced to typewriting at my instruction;

I further certify that I am not interested in this case nor of kin nor counsel to either party.

This 23rd day of March, 1987.

/s/ Patricia Towns
PATRICIA TOWNS, B-783
Certified Court Reporter

APPENDIX, PART V

IN THE SUPERIOR COURT OF ROCKDALE COUNTY

STATE OF GEORGIA

GAYLE ALLEN, BOBBY ALLEN, GEORGE WILLIAM STEPHENS, ROBIN BENNETT, JOHN BENNETT, STEVE WITTENMYER, SANDY WITTENMYER, JOE WILKINS, E. F. FORRESTER, RUBY FORRESTER, CHARLES B. ROTENBERG, BOB TRIVITT, DEBBIE TRIVITT, FRANK C. SNIPES, EULALIE LEVERETTE, DAVID LITTLE, BRENDA LITTLE, KEITH THOMAS KENNY THOMAS, JOSEPHINE WATSON, T. R. CHASTAIN, BETTY J. CHASTAIN, W. S. CONNER, MARVIN DOW, LINDA DOW, JESSIE FORTNER, DELLA FORTNER, LUCILLE LaMAR, TOMMY WILKERSON, JUDY WILKERSON, JOHN WALTON HENDERSON, SR., HAROLD MACHEN, ALTON C. HENDERSON, INDIVIDUALLY and as THE WALTON-NEWTON-ROCKDALE COUNTY HOMEOWNERS ASSOCIATION,	CIVIL ACTION
Plaintiffs,	FILE NO. 86-CV-1934
v.	(Filed February 26, 1987)

ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STRAY ANIMALS, INC., ROCKDALE COUNTY, GEORGIA,	)
Defendants.	)

ORDER

The Defendants Anne P. Fields and Gerald Fields in their individual and corporate capacities, having failed to appear for their own scheduled depositions on February 26, 1987, at 9:00 o'clock a.m. at the Rockdale County Courthouse, Conyers, Georgia,

IT IS ORDERED that,

all pleadings filed by or on behalf of Anne P. Fields, Gerald Fields, and Life for God's Stray Animals, Inc. in the instant action are hereby stricken, pursuant to O.C.G.A. Section 9-11-37.

SO ORDERED this 26th day of February, 1987.

/s/ Clarence R. Vaughn, Jr.
CLARENCE R. VAUGHN, JR., JUDGE
ROCKDALE SUPERIOR COURT
ROCKDALE JUDICIAL CIRCUIT

APPENDIX, PART VI

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GALE ALLEN, BOBBY ALLEN, GEORGE WILLIAM STEPHENS, ROBIN BENNETT, JOHN BENNETT, STEVE WITTENMYRE, SANDY WITTENMYRE, JOE WILKINS, TERRI WILKINS,, E. F. FORRESTER, RUBY FORRESTER, CHARLES B. ROTENBERG, BOB TRIVITT, DEBBIE TRIVITT, FRANK C. SNIPES, EULALIE LEVERETTE, DAVID LITTLE, BRENDA LITTLE, KEITH THOMAS, KENNY THOMAS, JOSEPHINE WATSON, T. R. CHASTAIN, BETTY J. CHASTAIN, W. S. CONNER, MARVIN DOW, LINDA DOW, JESSIE FORTNER, DELLA FORTNER, LUCILLE LAMAR, TOMMY WILKERSON, JUDY WILKERSON, JOHN WALTON HENDERSON, SR., HAROLD MACHEN, ALTON C. HENDERSON, INDIVIDUALLY AND AS THE WALTON-NEWTON-ROCKDALE COUNTY HOMEOWNERS ASSOCIATION, Unincorporated Association,	)	CIVIL ACTION
Plaintiffs,	)	
v.	)	FILE NO. 86-CV-1934

ANNE P. FIELDS,)
GERALD FIELDS, LIFE FOR)
GOD'S STRAY ANIMALS, INC.)
and ROCKDALE COUNTY,)
GEORGIA,)
)
Defendants.)

ORDER

The Plaintiffs' Motion for Protective Order having been filed on February 24, 1987, and after consideration thereof the court finds as follows:

FINDINGS OF FACT

On December 2, 1986, this court entered a scheduling Order to govern the pretrial progress of this litigation. Pursuant to that Order, all Motions were due to be filed no later than January 30, 1986. The hearing date set for Motions was February 11, 1987. The basis for the scheduling Order was to allow the parties a structured time frame in which to conduct discovery and to prepare for the trial of this case which was set for March 9, 1987. The court further finds that on December 5, 1986, the Plaintiffs noticed the depositions of Anne and Gerald Fields in their individual and coroporate capacities. Neither Mr. or Mrs. Fields appeared on the date scheduled for their depositions, nor was a protective order filed or a continuance of the depositions legally sought or allowed. The court further finds that the Defendants undertook no discovery whatsoever until their Notice of Oral Deposition was served upon counsel for the Plaintiffs on February 18, 1987, approximately one week after the date of the Motion hearing. On the day set for hearing, this court heard

argument on Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default for the Defendants' willful failure to appear at their scheduled depositions. In a written order of February 16, 1987, this court provisionally granted Plaintiffs' Motion predicated upon the Defendants' failure to appear for the depositions on or before 9:00 o'clock a.m., February 26, 1987. On said date, the Defendants did not appear for their depositions and an Order subsequently issued of this court striking their defensive pleadings. The Defendants still maintain their fugitive status.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following conclusion of law:

The Scheduling Order entered by this court on December 2, 1986, was entered to govern the parties pre-trial preparations. The requirement that all motions be filed on or before January 30, 1987, necessarily meant that the discovery period in this case would end on that date. Therefore, the Defendants' Notice of Oral Deposition is untimely, and accordingly, the Notice of Oral Depositions could not be enforced even if same were otherwise valid.

The court finds that the Defendants' total failure to respond to the Plaintiffs' lawful discovery and their failure to institute discovery prior to the time for filing Motions or to even move for an extension of discovery at the time of the hearing on February 11, 1987, is in an abuse of the discovery process under the Civil Practice Act which entitles the Plaintiff to protective relief from the court.

The court further finds that the Defendants' Notice of Oral Deposition is defective under O.C.G.A. Section 9-11-30 since same does not specify the time for each of the Plaintiffs' deposition but calls for all thirty-three (33) Plaintiffs to appear for their depositions at the same time. The court finds that the notice is unduly burdensome and oppressive upon the Plaintiffs as defined by O.C.G.A. Section 9-11-26 and therefore the court will not enforce said notice. The court further finds that the Defendants' defensive pleadings have been stricken and that a bench trial will occur on March 9, 1987, at which time the court will hear from Plaintiffs such evidence and testimony as they put up to substantiate their case and to support their prayers for relief. Moreover, there is no issue of damages in this case which would otherwise be a contested issue.

Based upon the foregoing, it is hereby Ordered that the Plaintiffs' Motion for Protective Order be granted and that the Defendants' Notice of Oral Deposition be quashed and that the depositions sought by the Defendants not be had.

This 9th day of March, 1987.

/s/ Clarence R. Vaughn, Jr.
Clarence R. Vaughn, Jr., Judge
Rockdale Superior Court
Rockdale Judicial Circuit

APPENDIX, PART VII

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, BOBBY ALLEN, GEORGE WILLIAM STEPHENS, ROBIN BENNETT, JOHN BENNETT, STEVE WITTENMYER, SANDY WITTENMYRE, JOE WILKINS, TERRI WILKINS, E. F. FORRESTER, RUBY FORRESTER, CHARLES B. ROTENBERG, BOB TRIVITT, DEBBIE TRIVITT, FRANK C. SNIPES, EULALIE LEVERETTE, DAVID LITTLE, BRENDA LITTLE, KEITH THOMAS, KENNY THOMAS, JOSEPHINE WATSON, T. R. CHASTAIN, BETTY J. CHASTAIN, W. S. CONNER, MARVIN DOW, LINDA DOW, JESSIE FORTNER, DELLA FORTNER, LUCILLE LAMAR, TOMMY WILKERSON, JUDY WILKERSON, JOHN WALTON HENDERSON, SR., HAROLD MACHEN, ALTON C. HENDERSON, INDIVUALLY AND AS THE WALTON-NEWTON-ROCKDALE COUNTY HOMEOWNERS ASSOCIATION, Unincorporated Association,	CIVIL ACTION
Plaintiffs,	FILE NO. 86-CV-1934
v.	(Filed March 11, 1987)

ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STRAY ANIMALS, INC. and ROCKDALE COUNTY, GEORGIA,	)
Defendants.	)

ORDER

The above styled case having come before the Court on March 9, 1987, the day originally scheduled for trial of this case, but now on the issue of judgment by default, and after hearing testimony and evidence from the Plaintiffs and argument of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACTS

On August 15, 1986, the Plaintiffs filed their Complaint for Abatement of Nuisance. Defendants answered the Plaintiffs' Complaint on or about November 6, 1986. Defendants' Answer admitted jurisdiction, venue and proper service of process. Therein, the Defendants further admitted that Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc. own, operate and manage an animal refuge on property located on or near Miller Bottom Road in Rockdale County, Georgia.

On February 16, 1987, after previously having heard argument from counsel for both parties and having given the Defendants an opportunity to explain their failure to appear as required by law, the Court entered an Order finding that the Defendants willfully failed to appear for their depositions as properly scheduled and noticed by the Plaintiffs for January 6, 1987. It was further ordered that the Defendants' Answer would be stricken pursuant

to O.C.G.A. Section 9-11-37(d) if the Defendants failed to appear for their depositions on or before 9:00 o'clock a.m., February 26, 1987, at the Rockdale County Courthouse. The Defendants did not appear at the designated time or place either individually or through counsel, and on February 26, 1987, the Court entered an Order striking all pleadings filed on behalf of the Defendants Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc.

The Court further finds that the Defendants Anne P. Fields and Gerald Fields are fugitives from this State and all appearances in this case have been through legal counsel. There is no issue of damages in this case.

The Court further finds that Defendants Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc. own, operate and manage an animal refuge on property located on or near Miller Bottom Road in Rockdale County, Georgia. At the present time, said Defendants are keeping approximately five hundred (500) cats and dogs on said property. The number of animals on the property causes loud noises to emanate therefrom. There is continuous barking and yelping at all hours of the day and night originating from the Defendants' property. Noxious odors also emanate from the property. There has been a substantial increase in the numbers of stray dogs roaming about the Plaintiffs' neighborhood since the inception of the animal shelter. These dogs have tended to band together in packs. The Court finds that these stray dogs constitute a threat to the persons and property of the Plaintiffs.

All Plaintiffs reside within approximately a three mile radius of the Defendants' property. Of the six Plain-

tiffs who testified at the final hearing, all lived within a one and one-half (1½) mile radius of the shelter. The Court also finds that the Plaintiffs have suffered special injury as a result of the Defendants' maintenance of the animal shelter. The Court finds that some Plaintiffs have necessarily kept their windows closed in the summertime in an attempt to lessen the annoyance caused by the noise and odor emanating from the Defendants' property. Most Plaintiffs have had to limit their outside activities because of the noise created by animals kept at the shelter. Other Plaintiffs have lost considerable amounts of sleep due to the loud barking, yelping and other noises coming from the property. Some Plaintiffs have been attacked by the stray dogs now present in the area. Others have lost livestock to the strays. The Court finds that the increase in strays is directly related to the Defendants' maintenance of the animal shelter on said property. The Court finds that the real property of at least one Plaintiff has become less marketable as a result of the presence of the animal shelter. The Court finds that the Defendants intend to move more animals to the subject property which would increase the noise level, odor and presence of stray dogs above that which now exists. The Court finds that no alternate remedy is available short of closing the shelter.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the Court makes the following conclusions of law:

1.

This Court has jurisdiction of the parties and of the subject matter of this litigation.

2.

Venue is proper in this case.

3.

The issue before the Court on this default hearing is whether under the facts presented through live testimony of the Plaintiffs and taking the allegations of the Plaintiffs' Complaint as admitted entitle Plaintiffs to the relief sought.

4.

The noise, odor and attraction of stray dogs created by the animal shelter located on Defendants' property on Miller Bottom Road in Rockdale County, Georgia interferes with the quiet enjoyment of the Plaintiffs' property.

5.

The injuries suffered by the Plaintiffs is such as would affect an ordinary reasonable person and not only those of fastidious taste.

6.

The Defendants' interference with the Plaintiffs' rights to the peaceful and quiet enjoyment of their real property constitutes a nuisance, both public and private, under Title 41 of the Official Code of Georgia Annotated.

7.

The appropriate remedy for the abatement of the aforesaid nuisance is the closing of said shelter.

WHEREFORE, IT IS HEREBY ORDERED as follows:

1. that judgment be entered for the Plaintiffs and against the Defendants, Anne P. Fields, Gerald Fields and Life for God's Stray Animals, Inc.;

2. that the maintenance of the animal shelter on Defendants' property located on or near Miller Bottom Road in Rockdale County, Georgia be and hereby is declared a nuisance;

3. Defendants are Ordered to abate said nuisance and to close and to cease to operate said animal shelter thereon; and

4. Defendants are to remove all animals from the property within thirty days (30) from the date of this Order.

SO ORDERED this 11th day of March, 1987.

/s/ Clarence R. Vaughn, Jr., Judge
Rockdale Superior Court
Rockdale Judicial Circuit

APPENDIX, PART VIII

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

GAYLE ALLEN, BOBBY ALLEN, GEORGE WILLIAM STEPHENS, ROBIN BENNETT, JOHN BENNETT, STEVE WITTENMYRE, SANDY WITTENMYRE, JOE WILKINS, E. F. FORRESTER, RUBY FORRESTER, CHARLES B. ROTENBERG, BOB TRIVITT, DEBBIE TRIVITT, FRANK C. SNIPES, EULALIE LEVERETTE, DAVID LITTLE, BRENDA LITTLE, KEITH THOMAS, KENNY THOMAS, JOSEPHINE WATSON, T. R. CHASTAIN, BETTY J. CHASTAIN, W. S. CONNOR, MARVIN DOW, LINDA DOW, JESSIE FORTNER, DELLA FORTNER, LUCILLE LAMAR, TOMMY WILKERSON, JUDY WILKERSON, JOHN WALTON HENDERSON, SR., HAROLD MACHEN, ALTON C. HENDERSON, INDIVIDUALLY and as THE WALTON-NEWTON-ROCKDALE COUNTY HOMEOWNERS ASSOCIATION,	CIVIL ACTION
Plaintiffs,	FILE NO. 86-CV-1934
v.	(Filed March 18, 1987)
ANNE P. FIELDS, GERALD FIELDS, LIFE FOR GOD'S STRAY ANIMALS, INC., ROCKDALE COUNTY, GEORGIA,	
Defendants.	

ORDER

The Defendants ANNE P. FIELDS, GERALD FIELDS, and LIFE FOR GOD'S STRAY ANIMALS, INC. (L.F.G.S.A.) having filed a Motion to Set Aside Default and for Continuance on Constitutional Grounds, a Motion to Recuse and to Change Venue, and a Motion to Allow Defendants to Cross-Examine and Present Evidence, the court makes the following order.

The case was originally set down according to the following calendar. All motions were to be filed by February 1, 1987, and were heard on February 11, 1987, and the bench trial was set down for March 9, 1987. It was made clear to all concerned that requests for continuances would be looked on with extreme disfavor.

On February 11, 1987, Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees, and Defendants' Motion to Change Venue and Demand for Jury Trial, were heard. The Defendants withdrew their Motion to Dismiss Gerald Fields. On February 16, 1987, an order was entered. The Defendants' Motion to Change Venue and Demand for Jury Trial was denied. The Plaintiffs' Motion to Strike Defendants' Pleadings and for Entry of Default Judgment and for Attorneys' Fees was granted in part as follows. Defendants were given a last opportunity to attend their own depositions on or before 9:00 o'clock a.m., February 26, 1987, and the failure to attend would result in the striking of the Fields' and L.F.G.S.A.'s pleadings. Note that the Fields did not attend their scheduled depositions on January 6, 1987, and the court found in that order of February 16, 1987, that the failure to attend was

a wilfull, conscious, intentional failure to appear by the Fields, who are fugitives on a civil contempt in another case. The finding of wilfullness was made based upon what the court heard during the February 11 hearing.

On February 26, 1987, an order was entered striking Defendants Fields and L.F.G.S.A.'s pleadings.

The trial was had on March 9, 1987, and an order entered on March 11, 1987. Rulings on Defendants' motions were made from the bench on March 9. This written order embodies those rulings.

The court finds itself dealing with the motions of parties whose previous pleadings have been stricken. Additionally, the deadline for motions to be filed and heard has expired. However, two of three motions by Defendants could not have been filed prior to the deadline, and do relate somewhat to the striking of the pleadings. However, that is not the case with the Motion to Recuse and to Change Venue.

The Motion to Recuse and to Change Venue was not timely filed. Additionally, it is duplicative of Defendants Fields and L.F.G.S.A.'s prior Motion to Change Venue and Demand for Jury Trial, which was denied for the reasons set forth in the order of February 16, 1987. Defendants will note that the recusal issue was specifically dealt with in the February 16, 1987 order. The Motion to Recuse and to Change Venue is untimely, redundant, and lacks merit.

The issues raised in the Motion to Set Aside Default and for Continuance on Constitutional Grounds lacks merit, and the motion is therefore denied. Specifically re-

garding the issue of wilfullness, the hearing of February 11, 1987 constituted a hearing on the issue of wilfullness, and the order of February 16, 1987 found the Fields' failure to attend their depositions to be wilfull.

The issues raised in the Motion to Allow Defendants to Cross-Examine and Present Evidence also lack merit, and the motion is therefore denied.

IT IS THEREFORE ORDERED that:

1. The Motion to Recuse and to Change Venue is denied because it is untimely, because the issues raised have been previously adjudicated, and on the merits;

2. The Motion to Set Aside Default and for Continuance on Constitutional Grounds is denied; and

3. The Motion to Allow Defendants to Cross-Examine and Present Evidence is denied.

This 18th day of March, 1987.

Nunc Pro Tunc March 9, 1987.

/s/ Clarence R. Vaughn, Jr.
Clarence R. Vaughn, Jr. Judge
Rockdale Superior Court
Rockdale Judicial Circuit

APPENDIX, PART IX

SUPREME COURT OF GEORGIA

ATLANTA SEP 25 1987

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ANN P. FIELDS et al. v. GAYLE ALLEN, et al.

Pursuant to rule 14 of the Rules of the Supreme Court, this court assesses a $500.00 penalty for frivolous appeal against Ann P. Fields and a $500.00 penalty against Gerald Fields. All the Justices concur, except Smith, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

APPENDIX, PART X

9-11-37. Failure to make discovery; motion to compel; sanctions; expenses.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending or, on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken:

(2) *Motion; protective order.* If a deponent fails to answer a question propounded or submitted under Code Section 9-11-30 or 9-11-31, or a corporation or other entity fails to make a designation under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31, or a party fails to answer an interrogatory submitted under Code Section 9-11-33, or if a party, in response to a request for inspection submitted under Code Section 9-11-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to subsection (c) of Code Section 9-11-26;

(3) *Evasive or incomplete answer.* For purposes of the provisions of this chapter which relate to depositions and discovery, an evasive or incomplete answer is to be treated as a failure to answer; and

(4) *Award of expenses of motion.*

(A) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(1) *Sanctions by court in county where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being

taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this Code section or Code Section 9-11-35, the court in which the action is pending may make such orders in regard to the failure as are just and, among others, the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders, or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; or

(E) Where a party has failed to comply with an order under subsection (a) of Code Section 9-11-35 requiring him to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph,

unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders, or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Code Section 9-11-36 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that the request was held objectionable pursuant to subsection (a) of Code Section 9-11-36, or the admission sought was of no substantial importance, or the party failing to admit had reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.*

(1) If a party or an officer, director, or managing agent of a party or a person designated under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf of a party fails to appear before the officer who is to take his deposition, after being served with

a proper notice, or fails to serve answers or objections to interrogatories submitted under Code Section 9-11-33, after proper service of the interrogatories, or fails to serve a written response to a request for inspection submitted under Code Section 9-11-34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just; and, among others, it may take any action authorized under subparagraphs (b)(2)(A) through (b)(2)(C) of this Code section. In lieu of any order, or in addition thereto, the court shall require the party failing to act or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(2) The failure to act described in the provisions of this chapter which relate to depositions and discovery may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by subsection (c) of Code Section 9-11-26. (Ga. L. 1966, p. 609 § 37; Ga. L. 1967, p. 226, § 18; Ga. L. 1970, p. 157, § 1; Ga. L. 1972, p. 510, § 10; Ga. L. 1984, p. 22, § 9.)